Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

STATE OF KANSAS, *et al.*

Petitioners,

v.

CHEROKEE ROBINSON, *et al.*

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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160 pp

QUESTIONS PRESENTED

1. May a private action under 42 U.S.C. 1983 be brought to enforce disparate impact regulations promulgated by a federal administrative agency under Title VI of the Civil Rights Act of 1964?

2. Is 42 U.S.C. 2000d-7 a voluntarily waiver by the States of their Eleventh Amendment immunity?

PARTIES TO THE PROCEEDINGS

Lajuan Cherokee, by and through his mother and next friend Earnestine Robinson.

Mytesha Robinson, by and through her mother and next friend Earnestine Robinson.

Eric Montoy, by and through his father and next friend Reuben Montoy.

Ryan Montoy, by and through his father and next friend Reuben Montoy.

Sierra Gwin, by and through his mother and next friend Kimberly Gwin.

Seth Gwin, by and through his mother and next friend Kimberly Gwin.

Rene Bess, by and through his grandfather and next friend Earl Bess, Jr.

Keely Boyce, by and through his mother and next friend Kenna Boyce.

Cruiz Cedillo, by and through his mother and next friend Sandra Delgado.

Lynette Do, by and through his mother and next friend Lieu Do.

Ezekial Garcia, by and through his mother and next friend Evangelina Garcia.

Emerald Garcia, by and through his mother and next friend Evangelina Garcia.

Christopher Harding, by and through his mother and next friend Phyllis Harding.

Monique Harding, by and through her mother and next friend Phyllis Harding.

Joseph Hawkinson, by and through his mother and next friend Melody Hawkinson.

Lauri Maynes, by and through her father and next friend Robert Maynes.

Jennie Nguyen, by and through her father and next friend Phillip Nguyen.

Shasta Oaks, by and through her mother and next friend Mary Lu Tripplit.

Sandy Thu Pham, by and through her father and next friend Da Thu Pham.

Nicole Thu Pham, by and through her father and next friend Da Thu Pham.

Bruce Thu Pham, by and through his father and next friend Da Thu Pham.

Andrea Bethke, by and through her mother and next friend Linda Bethke.

Unified School District No. 443, Dodge City, Kansas. This plaintiff voluntarily dismissed its case in the District Court.

Unified School District No. 305, Salina, Kansas. This plaintiff voluntarily dismissed its case in the District Court.

State of Kansas.

Bill Graves, in his official capacity as the Governor of the State of Kansas.

Linda Holloway, in her official capacity as the Chairperson of the State Board of Education of the State of Kansas (the Chair of the Kansas State Board of Education will change at the Board's next organizational meeting after the inauguration on January 13, 2003).

Andy Tompkins, in his official capacity as the Commissioner of the State Department of Education of the State of Kansas.

Kathleen Sebelius, in her official capacity as the Governor of the State of Kansas (after her inauguration as Governor of Kansas on January 13, 2003).

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OPINIONS BELOW

The original decision of the United States Court of Appeals for the Tenth Circuit, dated July 9, 2002, (Pet. App. 1a-13a) is reported 295 F.3d 1183. The order denying a petition for rehearing en banc (Pet. App. 14a-15a) is dated October 24, 2002. The judgment of the United States District Court for the District of Kansas, dated September 14, 2000, (Pet. App. 16a-63a) is reported at 117 F. Supp. 2d 1124.

JURISDICTION

The decision of the United States Court of Appeals for the Tenth Circuit, denying the petition for rehearing en banc, was filed and entered on October 24, 2002, and is now final. This Court has jurisdiction to review the decision by writ of certiorari under 28 U.S.C. § 1254(1).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional sections are Article I, Section 8, Clause 1 of the United States Constitution (the spending clause), the Eleventh and Fourteenth Amendments to the United States Constitution. The pertinent statutory sections are Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, 42 U.S.C. § 2000d-7(a); Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1; and 42 U.S.C. § 1983. The pertinent Department of Education regulations are stated at 34 C.F.R. § 100.3(b)(2) (1999). The constitutional, statutory and administrative regulations at issue are reproduced at Pet. App. 64a-77a.

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[1] Given the Eleventh Amendment question presented in this petition, 28 U.S.C. § 2403(a) may apply. Copies of this petition for certiorari are therefore being served on the Solicitor General of the United States. The United States Department of Justice has entered its appearance and has appeared in both the district court and the court of appeals.

STATEMENT

1. Facts of the Case

This case is the continuing saga of school finance litigation in the State of Kansas. *See Unified Sch. Dist. No. 229 v. Kansas,* 885 P.2d 1170 (Kan. 1994) where the Kansas Supreme Court found the current school finance funding formula constitutional. On May 21, 1999 the respondents, a group of school children, their parents and their school districts, filed the present action in the United States District Court alleging violations directly under the Fourteenth Amendment to the United States Constitution; disparate impact under Section 504 of the Rehabilitation Act; disparate impact under the implementing regulations of Title VI of the Civil Rights Act of 1964; and directly under the Kansas Constitution.

The current respondents are parents and students enrolled in middle sized Kansas school districts. The gist of the plaintiffs claims are they do not receive the same funding per student from the State that students in less populated school districts receive. Further, the plaintiffs claim they do not receive the same quality of education that economies of scale provide to students who attend the largest school districts in the state.

2. United States District Court proceedings

The respondents named the State of Kansas; Bill Graves, in his official capacity as Governor of the State of Kansas; Linda Holloway, in her official capacity as Chair of the State Board of Education; and Andy Tompkins, in his official capacity as Commissioner of the State Department of Education as defendants. The respondents sought "prospective injunctive relief against these defendants requiring them to revise Kansas' school finance law to comply with all applicable state and federal law." Pet. App. 91a. The respondents' ask the federal court to allocate state school finance dollars raised

from both federal and state sources according to federal, not state, priorities.

The petitioners moved to dismiss on various grounds including sovereign immunity. In response, the local school districts voluntarily dismissed themselves from the case as parties. The respondents also dismissed all claims in the United States District Court arising under the Constitution and laws of the State of Kansas. *See* Pet. App. 16a-17a. The District Court denied the States' Motion. *Id.* The State appealed.

3. Kansas State Court proceedings

The respondents refiled the state constitutional claims in the Shawnee County, Kansas District Court. Unified School District Numbers 305 and 443 were also parties to this lawsuit. After two years of discovery, the Shawnee County District Court dismissed the state constitutional claims stating "after careful review, this Court finds and concludes that the issues presented fail to suggest that the school finance formula is unconstitutional under currently prevailing rules established by the Kansas Supreme Court." Pet. App. 100a. The Shawnee County District Court denied the respondents petition for reconsideration. *Id.* at 101a-104a. The respondents have appealed these decisions to the Kansas Supreme Court. The Kansas Supreme Court has yet to render an opinion on the appeal.

4. United States Court of Appeals proceedings

The United States Court of Appeals for the Tenth Circuit affirmed the United States District Court decision. In its decision the Court of Appeals assumed for the purposes of the appeal that the respondents would amend the pleadings to state a claim. The respondent's allege in their complaint the State of Kansas violates the implementing regulations of the United States Department of Education when it disperses state and federal funds to local school districts used to educate Kansas

youth. This Court in *Alexander v. Sandoval,* 532 U.S. 275 (2001) determined that the regulations created under Section 602 of the Civil Rights Act of 1964 do not create an individually enforceable federal right for disparate impact claims. Following the dissent in *Alexander v. Sandoval,* the Court of Appeals then ruled "[d]isparate impact claims may still be brought against state officials for prospective injunctive relief through an action under 42 U.S.C. § 1983 to enforce section 602 regulations." Pet. App. 4a.

The respondent's alleged the State violated the Rehabilitation Act in its dispersal of state and federal funds to local school districts. The Court of Appeals determined that "waiver may also result from a state's actions, specifically its participation in a particular federal program." Pet. App. 7a. The Court of Appeals then found 42 U.S.C. § 2000d-7(a)(1) to be a clear statement of Congress' "intent to condition participation" in the Rehabilitation Act "on a State's consent to waive its constitutional immunity." *Id.* at 8a. The court then found *Lane v. Pena,* 518 U.S. 187 (1996) "to constitute 'the sort of unequivocal waiver that our precedents demand.' We therefore hold that by accepting federal financial assistance as specified in 42 U.S.C. § 2000d-7, states and state entities waive sovereign immunity from suit." Pet. App. 8a-9a.

The petitioners petitioned the United States Court of Appeals for the Tenth Circuit for an *en banc* hearing which was denied. The respondents' have amended their complaint in the United States District Court in response to assumptions made by the District Court and the Court of Appeals. The respondent's Amended Complaint is found at Pet. App. 105a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Review Whether the Disparate Impact Regulations Issued Under Section 602 of Title VI of the Civil Rights Act of 1964 can be enforced by 42 U.S.C. § 1983.

The Court should review this question because the circuits are split on whether 42 U.S.C. § 1983 can be used as a private right of action to enforce disparate-impact regulations under Title VI and because the Tenth Circuit's decision undermines this Court's decision in *Alexander v. Sandoval.*

A. The Circuits are Split on Whether the Disparate Impact Regulations Issued Under Section 602 can be enforced by 42 U.S.C. § 1983.

The Tenth Circuit, in finding that an administrative agency can create a regulation (specifically 34 C.F.R. § 100.3(b)(2) (1999)) without supporting Congressional authority which is enforceable against state officers in their official capacity pursuant to 42 U.S.C. § 1983, is the first Court of Appeals to reach that conclusion after this Court's decision in *Sandoval.* The Tenth Circuit, with little analysis, embraced Justice Stevens dissent in *Sandoval* and perfunctorily declared the respondents have a cause of action. The Tenth Circuit then encouraged the respondents to amend their pleadings to include a claim under 42 U.S.C. § 1983. The Tenth Circuit joins the Sixth Circuit which concluded in *Loschiavo v. City of Dearborn*, 33 F. 3d 548 (6th Cir. 1994) that a regulation, even without Congressional authorization, can establish a right which can be enforced under 42 U.S.C. § 1983.

In contrast to those circuits, the Third Circuit has held, after closely considering the *Sandoval* decision, that "disparate impact regulations cannot create a federal right enforceable through section 1983." *South Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot.*, 274 F.3d 771, 788 (3d Cir. 2001). The Third Circuit specifically followed the approach

taken by the Fourth Circuit in *Smith v. Kirk*, 821 F.2d 980 (4th Cir. 1987) and the Eleventh Circuit in *Harris v. James*, 127 F.3d 993 (11th Cir. 1997) when it determined a regulation alone may not create a right enforceable under 42 U.S.C. § 1983.

In reaching its decision in *South Camden*, the Third Circuit extensively reviewed this Court's majority opinion in *Sandoval* which held "that a private right of action is not available to enforce disparate impact regulations promulgated under Title VI." 274 F.3d at 777. The Third Circuit then reviewed the well-known language of 42 U.S.C. § 1983 and determined that "section 1983 provides a remedy for deprivation under state law of 'any rights . . . secured by the Constitution and laws." *Id.* at 779. The court determined "plaintiffs seek to enforce a prohibition on disparate impact discrimination that does not appear explicitly in Title VI, but rather is set forth in . . . regulations." *Id.* at 780. The court then went through the *Blessing* analysis and determined by passing Title VI Congress had not intended to benefit the plaintiff through establishing a new right. The *South Camden* court held "that an administrative regulation cannot create an interest enforceable under section 1983 unless the interest already is implicit in the statute authorizing the regulation, and that inasmuch as Title VI proscribes only intentional discrimination, the plaintiffs do not have a right enforceable through a 1983 action under the [agency's] disparate impact discrimination regulations." *Id.* at 774.

The five circuits that have determined the issue have split with three circuits holding a regulation does not establish a right enforceable under 42 U.S.C. § 1983 without an underlying statute explicitly establishing such a right. Two circuits, including the Tenth Circuit in the case at bar, have determined otherwise.

This issue warrants plenary review. The United States Supreme Court is closely divided. The Courts of Appeals are

sharply divided with one taking the majorities position in *Sandoval* and the other following the dissent. This issue is both important and recurring.

B. The United States Court of Appeals for the Tenth Circuit Decision is Contrary to this Court's Decision in *Alexander v. Sandoval.*

The United States Court of Appeals for the Tenth Circuit's decision contravenes this Court's precedents, especially *Alexander v. Sandoval.* This Court has held there is no private right of action to enforce disparate-impact regulations under section 602 of Title VI, 42 U.S.C. § 2000d. *See Alexander v. Sandoval*, 532 U.S. 275. However, in spite of this ruling, the Tenth Circuit found:

> "The Court's decision does not bar *all* claims to enforce such regulations, but only to disparate impact claims brought by private parties directly under Title VI. [523 U.S.] at 299-300 (Stevens, J., dissenting). Disparate impact claims may still be brought against state officials for prospective injunctive relief through an action under 42 U.S.C. 1983 to enforce section 602 regulations. *Id.*"

Pet. App. 3a-4a. The respondents have brought claims to enforce disparate impact regulations under Title VI. The Tenth Circuit has allowed this claim to go forward and has "urged" the respondents to amend their complaint. Pet. App. 3a, n.2.

This Court thoroughly analyzed Section 602 in *Alexander v. Sandoval* and stated:

> "Section 602 authorizes federal agencies 'to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability.' 42 U.S.C. § 2000d-1. It is immediately clear that the 'rights-creating' language so critical to the Court's analysis in *Cannon* [*v. Univ. of Chicago,* 444 U.S. 667] of § 601, *see* 441 U.S. at 690, n.13, is completely absent from § 602."

532 U.S. at 288. Section 602 does not confer rights upon students who are purportedly protected by the statute. Section 602 does not forbid the States or state school boards or local school board or even local schools from discriminating against their students. Section 602 focuses on the federal agencies "that will do the regulating." *Id.* Section 602 is "phrased as a directive to federal agencies engaged in the distribution of public funds." *Id.* A Congressional directive to a federal agency to do its work does not create a private individual right. An agencies attempt to create a private individual right out of a Congressional directive to that agency goes beyond Congresses delegation of power.

The relevant Department of Education regulation under which the respondents claim a federal right is 34 C.F.R. § 100.3(b)(2) which states:

> "A recipient [of federal funds] may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."

The regulations, specifically 34 C.F.R. § 100.3(b)(2), are a prohibition to the "recipient" of federal funds. The regulations do not give a right to the respondents in this matter. Further, the regulations prohibit the utilization of "criteria or methods of administration which have the effect of subjecting individuals to discrimination." The regulations go beyond the prohibition of "intentional" discrimination stated in Title VI. Finally, the regulations prohibit actions of local schools and school officials. The respondents have sued the State and the State officials who obtain the federal funds and pass the funds directly to local school districts. The parties prohibited from discriminating against the respondents are the school officials

and school districts who have dismissed themselves from this lawsuit.

The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides a remedy to a person for deprivation under state law of "any rights, privileges or immunities secured by the Constitution and *laws*." The issue is the purported deprivation of these students rights under the regulations grounded in Section 602. The respondents do not claim they are being denied a right secured by the United States Constitution, nor by a federal statute enacted by Congress. The respondents claim they were denied a right established by 34 C.F.R. § 100.3, a regulation promulgated by the United States Department of Education. The statute which creates the regulation, 42 U.S.C. § 2000d-1, does not support the right the respondents claim was violated.

"Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Alexander v. Sandoval*, 532 U.S. at 291. The "authorizing portion of section 602 reveals no congressional intent to create a private right of action." *Id.* at 289. By passing Title VI in the fashion it did, the Congress intended to prevent "intentional" discrimination. On the other hand, Congress did not fashion Title VI, Section 602 to prevent the "disparate impact" discrimination which is forbidden by 34 C.F.R. § 100.3.

The respondent's rights secured by the Constitution and laws of the United States do not include the regulations underpinning Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1. In other words, the regulations do not create an individually enforceable right for the respondents. Because the regulations went beyond the statute's implementing authority, no right of the respondents was violated.

II. The Court Should Review Whether a State's Acceptance of Federal Funds Amounts to a Declaration of Waiver.

The Court should review this question because the circuits are now split on whether a State's acceptance of federal funds necessarily waives the State's constitutional immunity. The Court should review this question because the Tenth Circuit's decision conflicts with the decision of other circuits and with this Court's decision in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999).

A. The Circuits are Split on Whether a Waiver Occurs When a State Agency Accepts Federal Funds in Light of Section 2000d-7.

The United States Court of Appeals for the Tenth Circuit, in finding that Section 2000d-7 leads to a waiver of Eleventh Amendment immunity, has joined the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits, which have also held that States or State agencies have waived their immunity from Rehabilitation Act claims by accepting federal funds. *See Littman v. George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999); *Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Ohio Envtl. Prot. Agency v. Nihiser*, 269 F.3d 626 (6th Cir. 2001); *Stanley v. Litscher*, 213 F.3d 340 (7th Cir. 2000); *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000) (en banc); *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997); *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *rev'd on other grounds, Alexander v. Sandoval*, 532 U.S. 275 (2001).

In contrast to those circuits, the United States Court of Appeals for the Second Circuit has recently held that a New York agency did not waive it's States immunity from Rehabilitation Act claims, and in reaching that conclusion, the Second Circuit identified the critical flaw in the reasoning of the other Circuits. *See Garcia v. S.U.N.Y. Health Serv. Ctr.*, 280 F.3d 98 (2d Cir. 2001). In *Garcia*, the court agreed with the other circuits that Section 2000d-7 expresses Congress's

clear intent to have the States waive immunity, but the court said that finding such clear intent is only the first step of a two-step process. After Congress invites a state to waive, the state must then express its clear intent to accept that invitation. The *Garcia* court cited this Court's teaching in *College Savings* that

> there is a fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress's expressing unequivocally its intention that if the State takes certain action [e.g. accepting federal funds] it shall be deemed to have waived that immunity.

Garcia, 280 F.3d at 114 (quoting *College Savings*, 527 U.S. at 680-81).

Having found that it must look at the State's intent as well as Congress's, the Second Circuit then examined whether the New York agency did in fact waive its states immunity by accepting federal funds, and it concluded that it did not waive. The court noted that any waiver is a relinquishment of a known right, and it reasoned that New York could not have known that it had any immunity to waive in the early 1990's, because of the interplay between the Rehabilitation Act and the ADA. "At the time New York accepted the conditioned funds, Title II of the ADA was reasonably understood to abrogate New York's sovereign immunity under Congress's Commerce Clause authority." Further, since "the proscriptions of Title II and 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity . . . since by all reasonable appearances state sovereign immunity had already been lost." *Id.*

The United States Court of Appeals for the Ninth Circuit is also split on the issue. In *Douglas v. California Department of Youth Authority,* 285 F.3d 1226 (9th Cir. 2002), four members of the Ninth Circuit wrote a stinging dissent in the denial of a petition for a hearing en banc where the appellate

court followed its *own* precedent in *Clark v. California,* 123 F.3d 1267, a case decided before the United States Supreme Court's recent abrogation decisions. "To establish waiver, Congress must first make it clear that amenability to suit in federal court is a condition of a State accepting federal funds, and, second, the State must make a 'clear declaration' that it intends to waive its immunity." 285 F.3d at 1227. The dissent in *Douglas* concluded that the Rehabilitation Act meets the first requirement with Congress's enactment of 42 U.S.C. § 2000d-7. In reaching their conclusion that California had not accepted Congress's overtures, the dissenters reasoned the "State's decision to waive its immunity must be 'altogether voluntary'" and the "'test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.' *College Savings,* 527 U.S. at 675." 285 F.3d at 1228.

> "As with the waiver of any constitutionally protected right, a State must make an 'intentional relinquishment or abandonment of a known right or privilege' [527 U.S.] at 682 (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)). Finally, courts must 'indulge every reasonable presumption *against* waiver' of fundamental constitutional rights. *Id.* (quoting *Aetna Ins. v. Kennedy ex rel. Bogash,* 301 U.S. 389, 393 (1937))."

Id. at 1229. The dissenters conclude:

> "at the time California allegedly engaged in discriminatory hiring practices and also accepted Rehabilitation Act funds, it did *not know* it possessed the right to resist federal court jurisdiction. Without this knowledge, gleaned *only after* the Supreme Court decided *Garrett,* California's acceptance of funds simply could *not* constitute an unequivocal or intentional abandonment of its Eleventh Amendment rights."

285 F. at 1229.

All Courts of Appeals agree that through 42 U.S.C. § 2000d-7 Congress intended to invite the States to waive their Constitutional immunity through the acceptance of federal funds. The Courts of Appeals depart in their analysis on the intent of the States by accepting federal funds. The majority assumes the acceptance of federal funds is a waiver by a State of its sovereign immunity. The minority opinion focuses on the state's intent to waive its fundamental right to immunity. The minority holds the federal government cannot assume a state waives its sovereign immunity simply by accepting federal largesse. The Second Circuit and the dissenters in the Ninth Circuit believe that Congress cannot make a state's decision for it. The minority follows rulings of this Court that a state must knowingly waive it's sovereign immunity.

The split here warrants review because the majority of the circuits have conflicted with this Court's decisions in the same way that the Tenth Circuit did. That is, the problem in several circuits is not just that they reached the wrong answer on whether the State waived, but that like the Tenth Circuit, those other circuits did not even ask the right question. As the Second Circuit noted, they

> "focus exclusively on whether Congress clearly expressed its intention to condition waiver on the receipt of funds and whether the state in fact received the funds. None of the cases considered whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity so as to make the consent meaningful, as the Supreme Court required in *College Savings.*"

280 F.3d at 115.

B. The United States Court of Appeals for the Tenth Circuit Decision Conflicts with the Court's Immunity Decisions.

The United States Court of Appeals for the Tenth Circuit's decision violates the Court's precedents, especially *College*

Savings, in several respects. As detailed below, the Court has explained the fundamental distinction between *abrogation,* which results from a unilateral declaration by Congress, and *waiver,* which results from a clear declaration *by the State.* The Court's decisions leave little room for finding a "Congressional waiver of State immunity," yet this is what the Tenth Circuit purported to find here. The appeals court held that it "recognized Section 2000d-7 as a valid and unambiguous waiver"–but the entire idea of "waiver" by a Congressional statute surely conflicts with *College Savings.* That is because this Court requires any "invitation to waive" to be an unambiguous statement of such an invitation, and Section 2000d-7 has always been recognized by this Court as a clear statement of abrogation.

1. *College Savings* draws a sharp line between Congressional abrogation and a State's voluntary waiver; while abrogation can be unilaterally declared by Congress, a State's waiver must be clearly declared by the State.

In *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 243 (1985), this Court explained that under the "clear statement" rule, any Congressional abrogation of State immunity would not be lightly inferred, as "Congress must express its *intention to abrogate* the Eleventh Amendment in unmistakable language in the statute itself." Notably, this language requires that Congress's intent must be a specific intent-an "intention to *abrogate*"–not merely a general intent to get the State into federal court by any of several alternative paths.

While *Atascadero* explains how Congress may unilaterally abrogate by issuing its own clear statement, *College Savings* sets an entirely different set of ground rules that apply in the very different waiver context. The Court explained that any search for a waiver begins with the fundamental principle that a waiver must ultimately come from the State itself; it must be "altogether voluntary," as shown by the State's own "clear

declaration" of waiver. *College Savings,* 527 U.S. at 675-76. These principles required the Court to reject the doctrine of implied or "constructive waiver," under which a State could *implicitly* waive its immunity by, for example, entering a field subject to Congressional regulation. *Id.* at 680, overruling *Parden v. Terminal R. Co. of Ala. Docks Dep't,* 377 U.S. 184 (1964). The "whole point of requiring a clear declaration *by the State* of its waiver is to be certain that the State in fact consents to suit." *College Savings,* 527 U.S. at 680 (emphasis is original).

A State's waiver is effected only by the *State's* declaration. Any Congressional statement on the subject can not be a unilateral statement *effecting* a waiver, but can at most be an "invitation to waiver." To be a true invitation that the State must be free to accept or decline it. If Congress presents a deal unilaterally–i.e., if it simply announces that waiver shall be constructively exacted when the State takes some act that it already has every right to take–then such a "forced waiver" is no "invitation to waive" at all, but is "little more than abrogation under another name." *Id.* at 684. As the Court noted, the equivalence of abrogation and "forced waiver," as opposed to a true "invitation to waive" was best shown in *College Savings* by the "revealing fact[]" that the "statutory provision relied upon to demonstrate that Florida constructively waived its sovereign immunity is the *very same provision* that purported to abrogate it." *Id.* (emphasis added).

2. The United States Court of Appeals for the Tenth Circuit's decision conflicts with *College Savings* by finding a "Congressional waiver" and by ignoring the need for a clear declaration by the State.

Under *College Savings,* a waiver-enticed-by-federal-funds is a bilateral process with clarity on both sides: Congress unequivocally states the invitation and condition, and the State clearly declares its assent and its waiver. But here, the Tenth

Circuit blurred the crucial distinction between unilateral abrogation and the bilateral invitation-and-waiver process, as it based its finding of waiver solely upon Congress's statement in Section 2000d-7, without even asking whether the State clearly declared its intent to waive. The Tenth Circuit stated that "[h]ere we have a federal statute under which a state unequivocally waives its immunity when it chooses to accept federal financial assistance." Pet. App. 9a. "We therefore hold that by accepting federal financial assistance as specified in 42 U.S.C. § 2000d-7, states and state entities waive sovereign immunity from suit. In doing so, we join our sister circuits who have uniformly so held as well." *Id.*

These statements characterizing Section 2000d-7 as "expressing waiver" makes no sense at all for the simple reason that Congress can never, under any theory, "waive" a State's immunity. As previously noted, Congress can either (1) abrogate or (2) invite a State to waive, but it cannot by itself effect a waiver.

Further, the Tenth Circuit's decision shows that its erroneous reference to Congressional "waiver" was not simply a poor choice of words, but that the court flatly ignored *College Savings's* insistence that a finding of waiver requires that the *State* "clearly declared" its intent to waive. In *College Savings,* the Court said plainly that a waiver could never be based solely on Congress's words as there is "a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." 527 U.S. at 680-81. This observation remains true *even if* those Congressional words are a clear invitation to waive. No matter how clearly Congress expresses its intention, a court must still find that the State declared its waiver. The Tenth Circuit, in defiance of *College Savings,* simply skipped that step entirely.

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The Tenth Circuit did not look for any clear statement of waiver by Kansas *on the facts of this case.* The Tenth Circuit did not review whether the United States, through its offer of funding under the Rehabilitation Act, specifically informed Kansas that to receive such funding it was necessary for the state to waive its sovereign immunity. The Tenth Circuit simply found the money was given to the Department of Education and Kansas accepted that funding. The Tenth Circuit reasoned, by accepting the federal funding the state waived its fundamental right to sovereign immunity through its actions.

Further, the Tenth Circuit did not review whether, or not, the entity supposedly waiving Kansas' fundamental right to sovereign immunity, the Kansas Department of Education, had the authority to do so. The Kansas Supreme Court has entered into the federalism debate by holding that only the Kansas Legislature can waive Kansas' sovereign immunity. *See Schall v. Wichita State Univ.,* 7 P.3d 1154 (Kan. 2000); *Goldbarth v. Kansas State Bd. of Regents,* 9 P.3d 1251, 1260 (Kan. 2000); and *Prager v. Kansas State Dep't of Revenue,* 20 P.3d 39, 56 (Kan. 2001). The Kansas Legislature, either through legislation or a specific vote accepting an annual offer of assistance from the Congress under the Rehabilitation Act coupled with a waiver of sovereign immunity, has not waived its immunity under the Eleventh Amendment.

At the outset of the opinion the Tenth Circuit held "that Kansas *has* waived its sovereign immunity with respect to the claims against it for violation of the Rehabilitation Act, we need not reach the abrogation claim." Pet. App. 6a-7a. The Tenth Circuits scant, conclusory references to federal funds, without any link to what the State said or did here, shows that the court looked only to what Congress unilaterally decided.

The entire framework of the Tenth Circuit's opinion contradicts the waiver paradigm detailed in *College Savings,* and warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 2003

APPENDIX

UNITED STATES COURT OF APPEALS,
FOR THE TENTH CIRCUIT.

Earnestine ROBINSON, as mother and next friend of a minor, Mytesha Robinson, Cherokee Robinson and LaJuan Robinson; Reuben Montoy, as father and next friend of a minor Eric Montoy and Ryan Montoy; Kimberly Gwin, as mother and next friend of a minor Sierra Gwin and Seth Gwin; Earl Bess, Jr., as grandfather and next friend of a minor Rene Bess; Kenna Boyce, as mother and next friend of a minor Keely Boyce; Sandra Delgado, as mother and next friend of a minor Cruiz Cedillo; Lieu Do, as mother and next friend of a minor Lynette Do; Evangelina Garcia, as mother and next friend of a minor Ezekial Garcia and Emerald Garcia; Phyllis Harding, as mother and next friend of a minor Christopher Harding and Monique Harding; Melody Hawkinson, as mother and next friend of a minor Joseph Hawkinson; Robert Maynes, as father and next friend of a minor Lauri Maynes; Phillip Nguyen, as father and next friend of a minor Jennie Nguyen; Mary Lu Tripplitt, as mother and next friend of a minor Shasta Oaks; Da Thu Pham, as father and next friend of a minor Sandy Thu Pham, Nicole Thu Pham and Bruce Thu Pham; Linda Bethke, as mother and next friend of a minor Andrea Bethke, Plaintiffs Appellees,

and

Unified School District No. 443, and Unified District No. 305, Plaintiffs,

v.

State of KANSAS; Bill Graves, in his official capacity as the Governor of the State of Kansas; Linda Holloway, in her official capacity as the chairperson of the State Board of Education; Andy Tompkins, in his official capacity as Commissioner of the State Department of Education, Defendants-Appellants.

United States of America,
Intervenor-Appellee.

Nos. 00-3315, 00-3332.

July 9, 2002.

Before SEYMOUR and PORFILIO, Circuit Judges, and STAGG,* District Judge.

SEYMOUR, Circuit Judge.

Earnestine Robinson, on behalf of her minor children, Cherokee, LaJuan, and Mytesha, filed suit along with other plaintiffs against the State of Kansas, its governor, and two state education officials challenging the state's school financing scheme. Defendants filed motions to dismiss. The district court denied the motions holding, *inter alia,* that defendants do not enjoy Eleventh Amendment immunity from suit. *Robinson v. Kansas,* 117 F. Supp. 2d 1124 (D.Kan. 2000). Defendants filed an interlocutory appeal of the Eleventh Amendment immunity issue.[1] We affirm.

I.

Plaintiffs contend the Kansas state school financing system, through a provision for "low enrollment weighting" and "local option budgets," results in less funding per pupil in schools where minority students, students who are not of United States origin, and students with disabilities are

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* Honorable Tom Stagg, United States District Judge, Western District of Louisiana, sitting by designation.

[1] We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1292 and the collateral order doctrine, which permit appeal of interlocutory decisions in a limited set of exceptions to the final judgment rule. *See Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949); *see also Timpanogos Tribe v. Conway,* 286 F.3d 1195, 1199-1200 (10th Cir. 2002). The best established exception permits an interlocutory appeal of the denial of states' and state entities' claims to Eleventh Amendment immunity. *Timpanogos Tribe,* 286 F.3d at 1199-1200; *see also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy,* 506 U.S. 139, 147 (1993).

disproportionately enrolled. *See* School District Finance and Quality Performance Act, Kan. Stat. Ann. §§ 72-6405 through 72-6440 (1992) (SDFQPA). According to plaintiffs, SDFQPA and its enforcement have a discriminatory disparate impact on such students in violation of the implementing regulations of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d-1, the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, and plaintiffs' rights to due process and equal protection under the Fourteenth Amendment. They seek an injunction barring enforcement of the Act.[2]

After the parties filed their briefs with this court, and well after plaintiffs filed their original complaint, the Supreme Court held there is no private right of action to enforce disparate impact claims under the Department of Education regulations issued pursuant to section 602 of Title VI, 42 U.S.C. § 2000d.[3] *See Alexander v. Sandoval,* 532 U.S. 275 (2001).[4] The Court's decision does not bar *all* claims to

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[2] Plaintiffs' original complaint specifically sought a court order requiring defendants to revise Kansas' school finance law to comply with federal law. In their brief opposing defendants' motion to dismiss, however, plaintiffs stated they are willing to amend their complaint to request injunctive relief prohibiting defendants from enforcing a state law found to violate federal law. The district court "strongly" urged plaintiffs to so amend their complaint on this point, *Robinson,* 117 F. Supp. 2d at 1128 n.3, and plaintiffs reiterate on appeal their willingness to do so. *See* Aplee. Br. at 21.

[3] The Department of Education's regulation, 34 C.F.R. § 100.3(b)(2) (1999), relevant to this case reads:

> A recipient [of federal funds] may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

[4] The Court reaffirmed its prior holdings that a private right of action exists under Title VI, section 601, in cases involving *intentional*

enforce to such regulations, but only disparate impact claims brought by private parties directly under Title VI. *Id.* at 299-300 (Stevens, J., dissenting). Disparate impact claims may still be brought against state officials for prospective injunctive relief through an action under 42 U.S.C. § 1983 to enforce section 602 regulations.[5] *Id.*

The decision in *Sandoval* does not affect plaintiffs' right to bring a disparate impact claim under section 504 of the Rehabilitation Act and defendants do not contend otherwise. *See New Mexico Ass'n for Retarded Citizens v. New Mexico,* 678 F.2d 847, 854 (10th Cir. 1982) (recognizing cause of action under section 504 based on claims of disparate impact); *see also Alexander v. Choate,* 469 U.S. 287, 299 (1985) (declining to decide whether disparate impact claims may be brought under section 504). While the language of the relevant sections of the Rehabilitation Act and Title VI are essentially identical, *compare* 29 U.S.C. § 794 *with* 42 U.S.C. § 2000d, the Court's decision in *Choate* laid out the different aim of the Rehabilitation Act as well as the different context in which the Act was passed. *See Choate,* 469 U.S. at 296-97 ("[M]uch of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."); *see also id.* at 294 n.11 (noting that by the time Congress enacted the Rehabilitation Act every cabinet department and about 40 federal agencies had adopted standards in which Title VI was interpreted to bar programs with a discriminatory impact). Therefore, our decision in *New Mexico Ass'n for Retarded Citizens* continues to control.

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discrimination. *See Alexander v. Sandoval,* 532 U.S. 275, 279-82 (2001).

[5] Plaintiffs have indicated their willingness to amend their complaint to bring their Title VI disparate impact claims against the named state officials under § 1983. We will thus assume for the purposes of this appeal that such amendment will occur upon remand.

Defendants contend the Eleventh Amendment of the United States Constitution bars plaintiffs' suit. Defendants maintain that Congress did not abrogate their Eleventh Amendment immunity, that they did not waive such immunity, and that the relief sought against state officials named as defendants does not fall under the *Ex Parte Young* doctrine.[6]

The Eleventh Amendment issue challenges our subject matter jurisdiction, and the district court considered the matter as a Rule 12(b)(1) motion to dismiss. We review the district court's decision de novo. *See ANR Pipeline Co. v. Lafaver,* 150 F.3d 1178, 1186 (10th Cir. 1998) (*citing SK Finance SA v. La Plata County, Bd. of County Comm'rs,* 126 F.3d 1272, 1275 (10th Cir. 1997)) (dismissal under Rule 12(b)(1) standard); *see also Powder River Basin*

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[6] Defendants further contend the suit is barred under the *Younger* abstention doctrine. *See Younger v. Harris,* 401 U.S. 37 (1971). Their contention arises out of a suit plaintiffs filed in state court after defendants filed their motion to dismiss in this case. The state suit challenges the Kansas school funding scheme on state law and constitutional grounds. Defendants do not point to any place in the record where they raised the issue in the district court and, based on our independent review of the record, it does not appear defendants ever did so. The district court did not rule on the matter.

Defendants maintain their failure to raise the issue below is due to the fact that plaintiffs commenced the state proceeding after defendants filed their motion to dismiss. This is no excuse. It is well established that we do not consider on appeal an issue not passed on below. *Lyons v. Jefferson Bank & Trust,* 994 F.2d 716, 720 (10th Cir. 1993) (*citing Singleton v. Wulff,* 428 U.S. 106, 120 (1976)). While this rule is "not without exceptions," *id.* at 721, such exceptions arise "only in the most unusual circumstances." *Id.* Defendants have offered no support for a finding that such circumstances exist here. It is not even clear that we would have jurisdiction to consider a *Younger* claim such as that presented in this case on interlocutory appeal. *See Timpanogos Tribe v. Conway,* 286 F.3d 1195 (10th Cir. 2002); *see also Armijo By and Through Chavez v. Wagon Mound Pub. Sch.,* 159 F.3d 1253, 1264 (10th Cir. 1998). In short, we decline to reach the *Younger* issue on the merits.

Resource Council v. Babbitt, 54 F.3d 1477, 1483 (10th Cir. 1995) (dismissal under Eleventh Amendment/ *Ex Parte Young* doctrine).

II.

The Supreme Court interprets the Eleventh Amendment as a bar to suits in federal courts against an unconsenting state brought by the state's own citizens. *See Edelman v. Jordan,* 415 U.S. 651, 662-63 (1974). As with all constitutional rights, the rule of state sovereign immunity is not absolute. Congress may abrogate such immunity in the exercise of its power to enforce the Fourteenth Amendment. *See Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 670 (1999). Moreover, a state may waive its sovereign immunity. *See Innes v. Kan. State Univ. (In re Innes),* 184 F.3d 1275, 1278 (10th Cir.1999); *see also Lapides v. Bd. of Regents,* --- U.S. ----, ---- - ----, 122 S. Ct. 1640, 1643-44 (2002); *College Savs. Bank,* 527 U.S. at 670; *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 238 n.1 (1985). In addition, when a private party sues a state officer for prospective injunctive or declaratory relief from an ongoing violation of the Constitution or federal laws, the suit is not considered to be against the state itself and the Eleventh Amendment does not apply. *See Ex Parte Young,* 209 U.S. 123, 159-60 (1908); *see also Timpanogos Tribe,* 286 F.3d at 1205.

Defendants contend Congress did not validly abrogate state sovereign immunity so as to allow plaintiffs to sue them in federal court. They further maintain Kansas has not waived its sovereign immunity from suit in federal court. Finally, they contend *Ex Parte Young* is inapplicable in this case. Because we hold that Kansas *has* waived its sovereign immunity with respect to the claims against it for violation

of the Rehabilitation Act,[7] we need not reach the abrogation claim. We also hold that the *Ex parte Young* doctrine is applicable to permit suit against the state officials pursuant to section 1983 for the alleged violations of Title VI and the Fourteenth Amendment.

A.

As the Supreme Court has bluntly stated, it is an "unremarkable . . . proposition that the States may waive their sovereign immunity . . . ." *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 65 (1996). Such waiver may occur through a variety of statements or actions. Waiver may be voluntary, such as when a state invokes federal court jurisdiction. *See Lapides,* --- U.S. at ---- - ----, 122 S. Ct. at 1643-44; *College Sav. Bank,* 527 U.S. at 675. Waiver can also occur when the state "unequivocally" expresses its intent to submit itself to our jurisdiction. *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 99 (1984). While an unequivocal expression of waiver may be effected by language in a state statute or constitutional provision, waiver may also result from a state's actions, specifically, its participation in a particular federal program. *See Innes,* 184 F.3d at 1278 (*quoting Atascadero,* 473 U.S. at 238 n.1); *see also id.* at 1280 ("[W]aiver may be found not only in the text of a state statute or constitution but also by examining the underlying facts and circumstances of the case."). Any waiver requires "an unequivocal indication that the State intends to consent to federal jurisdiction that would otherwise be barred by the Eleventh Amendment." *Atascadero,* 473 U.S. at 238 n.1. Such is the case now before us.

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[7] Parties briefed the waiver and abrogation claims as they relate to plaintiffs' Title VI claim. As discussed above, plaintiffs' disparate impact claim may no longer be brought directly under Title VI but only via section 1983. Thus, this section of our decision relates only to plaintiffs' claim under the Rehabilitation Act.

The Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, was enacted to combat disadvantage suffered by and imposed upon people with mental and physical disabilities. *See* 29 U.S.C. § 794. While Congress may have intended the tenets of this statute to apply to states and state entities, the Supreme Court was not convinced. In *Atascadero,* the Court held the Rehabilitation Act "falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Atascadero,* 473 U.S. at 246. Declaration of this clear statement rule led Congress, in 1986, to amend, *inter alia,* the Rehabilitation Act and Title VI, to include such a clear statement.

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal Court for a violation of section 504 of the Rehabilitation Act [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7(a)(1).

In *Lane v. Pena,* 518 U.S. 187, 197-200 (1996), the Supreme Court declared section 2000d-7 to constitute "the sort of unequivocal waiver that our precedents demand."[8] We therefore hold that by accepting federal financial assistance as specified in 42 U.S.C. § 2000d-7, states and

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[8] Defendants contend the language in *Lane* is inapplicable here because *Lane* involved waiver of *federal* sovereign immunity. Aplt. Br. at 36. Aside from the fact that their brief on this point confuses abrogation and waiver, their contention is misplaced. While the specific facts of *Lane* may differ from those before us, the Court in that case described section 2000d-7 as "an unambiguous waiver of the States' Eleventh Amendment immunity." *Lane,* 518 U.S. at 200.

state entities waive sovereign immunity from suit. In doing so, we join our sister circuits who have uniformly so held as well. *See Jim C. v. United States,* 235 F.3d 1079, 1081-82 (8th Cir. 2000) (en banc); *Pederson v. Louisiana State Univ.,* 213 F.3d 858, 875-76 (5th Cir. 2000); *Stanley v. Litscher,* 213 F.3d 340, 344 (7th Cir. 000); *Sandoval v. Hagan,* 197 F.3d 484, 493-94 (11th Cir. 1999), *rev'd on other grounds, Alexander v. Sandoval,* 532 U.S. 275 (2001); *Litman v. George Mason Univ.,* 186 F.3d 544, 553-54 (4th Cir. 1999); *Clark v. California,* 123 F.3d 1267, 1271 (9th Cir. 1997).

Defendants also rely heavily upon our decision in *In re Innes. Innes* involved a question of waiver of sovereign immunity in the context of a contract between Kansas State University (KSU) and the United States Department of Education. The contract required KSU to perform certain actions, including submitting to federal court jurisdiction. No federal statute was involved, so the court was forced to inquire into the context surrounding the formation of the contract and the state statutes authorizing the making of such contracts by the state board of regents. Here, we have a federal statute under which a state unequivocally waives its immunity when it chooses to accept federal financial assistance. Defendants do not contend they did not voluntarily accept these funds, *see Litman,* 186 F.3d at 553, nor do they contend Congress has exercised its spending clause powers in an unconstitutional manner, *see id.* at 552-553 (*citing South Dakota v. Dole,* 483 U.S. 203 (1987)); *see also College Sav. Bank,* 527 U.S. at 686 (same). Thus, we fail to see how *Innes* is applicable.[9]

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[9] Defendants further argue they should not be held responsible for any of the actions alleged in plaintiffs' complaint because the Kansas Board of Education is "simply a conduit for federal funds which flow to local school boards . . . ." Aplt. Br. at 39. This fact is irrelevant when it is the Kansas Board of Education that applies for and administers federal funding and thus assures that it, as well as end-recipients of the funding,

III.

Plaintiffs also bring claims against Kansas' governor, the chairperson of the Kansas Board of Education, and the commissioner of the Kansas Board of Education in their official capacities seeking relief in the form of an injunction barring them from enforcing state laws found to be violative of federal law. We deal here with plaintiffs' Fourteenth Amendment claims. Our analysis will apply equally to plaintiffs' Title VI claims if plaintiffs amend their complaint on remand to allege a violation of Title VI under section 1983.[10]

As discussed above, the *Ex Parte Young* doctrine permits suits seeking prospective injunctive relief against state officials acting in their official capacities. *See Ex Parte Young,* 209 U.S. at 159-60 (1908); *see also Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71 n.10 (1989); *Elephant Butte Irrigation Dist. v. Dep't of the Interior,* 160 F.3d 602, 607-08 (10th Cir. 1998). In determining whether the *Ex Parte Young* doctrine governs a case, we apply a four-part framework.

> First, we determine whether the action is against state officials or the state itself. Second, we look at whether the alleged conduct of the state officials constitutes a violation of federal law. Third, we assess whether the relief sought is permissible prospective relief or analogous to a retroactive award of damages impacting the state treasury. Finally, we analyze whether the suit rises to the level of implicating "special sovereignty interests."

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will abide by laws and rules attached to such financial assistance. *See* Aplee. Supp. App. at 28-29 (Form signed by Kansas Board of Education Commissioner assuring, *inter alia,* compliance with "all Federal statutes relating to nondiscrimination.").

[10] *See supra* notes 2 and 5.

Timpanogos Tribe, 286 F.3d at 1205 (quoting *ANR Pipeline Co.,* 150 F.3d at 1193).[11]

Applying the facts of this case to the doctrine of *Ex Parte Young* renders an easy conclusion. Without question, this action is against state officials acting in their official capacity: the Governor, the Commissioner of the state Board of Education, and the Chairperson of the state Board of Education. Relying upon a decision from the District of Maryland, defendants assert *Ex Parte Young* does not apply because the state was named as a party. *See Farmer v. Ramsay,* 41 F. Supp. 2d 587 (D.Md. 1999). However, even that decision acknowledged that while a state may not be sued directly for a violation of the Fourteenth Amendment, a party may seek prospective injunctive relief against state officials. *See id.* at 591. Insofar as plaintiffs seek such relief against defendant state officials, and not the state itself, their claims survive this part of the *Ex Parte Young* inquiry.

It is quite clear that the alleged conduct of the state officials constitutes a violation of the Fourteenth Amendment and, potentially, Title VI. It is also clear that the relief sought, upon amendment of plaintiffs' complaint, is permissible prospective relief: an injunction barring state officials from enforcing SDFQPA in a manner that violates federal law.[12] Although "[i]n many instances, even

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[11] Relying on a misreading of the Supreme Court's decision in *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261 (1997), defendants assert that because a state forum is available to plaintiffs, *Ex Parte Young* does not apply. However, *Coeur d'Alene Tribe* clearly states there are *two* instances in which the *Ex Parte Young* doctrine applies. *Id.* at 270. The first is when no state forum is available to vindicate federal interests. *Id.* The Court then gives a "second instance in which *Young* " applies: "when the case calls for the interpretation of federal law." *Id.* at 274. As counsel for defendants surely would concede, the case now before is an obvious example of the second instance.

[12] *See supra* note 3.

prospective relief will burden the state's treasury to some degree," *Elephant Butte,* 160 F.3d at 611 (*citing Edelman,* 415 U.S. at 668), this is not such an instance. Not only will the relief not require the payment of state funds, but more importantly it will "remedy future rather than past wrongs." *Id.* (citations and quotations omitted).

Defendants also assert plaintiffs' claims implicate "special sovereignty interests" similar to those set out in *Coeur d'Alene Tribe,* 521 U.S. at 281-88. In *Coeur d'Alene Tribe,* following an epic review of the history of state control over navigable waters, the Supreme Court held that a quiet title action for control of such waters implicated special sovereignty interests. This court, in *ANR Pipeline,* 150 F.3d at 1193-94, held that states possess a special sovereignty interest in its tax collection system. "[I]t is impossible to imagine that a state government could continue to exist without the power to tax." *Id.* at 1193. But we note that "special sovereignty interests" exist only in "particular and special circumstances." *Coeur d'Alene Tribe,* 521 U.S. at 287. This court has described *Coeur d'Alene* as an "extreme and unusual case." *Harris v. Owens,* 264 F.3d 1282, 1293 (10th Cir. 2001) (*quoting Elephant Butte,* 160 F.3d at 612). *See also J.B. v. Valdez,* 186 F.3d 1280, 1286-87 (10th Cir. 1999). Defendants have not come close to convincing us that the case here is either extreme or unusual.

Again, defendants' arguments are based on plaintiffs' unamended complaint and thus focus on the state's "special sovereignty interest" in enacting and revising its own laws rather than having a court order the legislature to revise laws a certain way. They present no arguments as to how enjoining officials from enforcing a state school finance law would implicate the "special sovereignty interests" of the sort described in *ANR* and *Coeur d'Alene Tribe.* We cannot see how the facts presented make this an "extreme and unusual case" that would require a ruling that the relief

requested implicates "special sovereignty interests."[13] We thus hold that defendant state officials are not protected by the Eleventh Amendment, pursuant to the *Ex Parte Young* doctrine.

For the forgoing reasons, we **AFFIRM** the decision of the district court denying defendants' motion to dismiss on the basis of Eleventh Amendment immunity.

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[13] Defendants also assert *Ex Parte Young* does not apply because defendants do not have the power to give plaintiffs the relief they seek. Their argument is premised on plaintiffs' original complaint seeking an injunction forcing a change in state law. If plaintiffs amend their complaint as they have indicated and seek an injunction prohibiting defendants from *enforcing* a state law found to be violative of federal law, defendants' contentions on this point will become moot. Even defendants concede that the Board of Education has the "general supervision of public schools," Aplt. Br. At 45, the governor and the named officials of the Board of Education are charged with enforcing the SDFQPA, making the named officials proper parties to this suit.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

EARNESTINE ROBINSON, as mother and next friend of a minor, Mytesha Robinson, Cherokee Robinson and LaJuan Robinson; REUBEN MONTOY, as father and next friend of a minor Eric Montoy and Ryan Montoy; KIMBERLY GWEN, as mother and next friend of a minor Sierra Gwin and Seth Gwin; EARL BESS, JR., as grandfather and next friend of a minor Rene Bess; KENNA BOYCE, as mother and next friend of a minor Keely Boyce; SANDRA DELGADO, as mother and next friend of a minor Cruiz Cedillo; LIEU DO, as mother and next friend of a minor Lynette Do; EVANGELINA GARCIA, as mother and next friend of a minor Ezekial Garcia and Emerald Garcia; PHYLLIS HARDING, as mother and next friend of a minor Christopher Harding and Monique Harding; MELODY HAWKINSON, as mother and next friend of a minor Joseph Hawkinson; ROBERT MAYNES, as father and next friend of a minor Lauri Maynes; PHILLIP NGUYEN, as father and next friend of a minor Jennie Nguyen; MARY LU TRIPPLITT, as mother and next friend of a minor Shasta Oaks; DA THU PHAM, as father and next friend of a minor Sandy Thu Pham, Nicole Thu Pham and Bruce Thu Pham; LINDA BETHKE, as mother and next friend of a minor Andrea Bethke,

Plaintiffs-Appellees,

and

UNIFIED SCHOOL DISTRICT NO. 443, and UNIFIED DISTRICT NO, 305,

Plaintiffs,

v.

STATE OF KANSAS; BILL GRAVES, in his official capacity as the Governor of the State of Kansas; LINDA HOLLOWAY, in her official capacity as the chairperson of the State Board of Education; ANDY TOMPKINS, in his

official capacity as Commissioner of the State Department of Education,

Defendants-Appellants.

Nos. 00-3315, 00-3332

ORDER

Filed October 24, 2002

Before **SEYMOUR, PORFILIO,** Circuit Judges, and **STAGG***, District Judge.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/
Deputy Clerk

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* Honorable Tom Stagg, United States District Judge, Western District of Louisiana, sitting by designation.

**UNITED STATES DISTRICT COURT,
DISTRICT OF KANSAS.**

**Cherokee, Lajuan and Mytesha
ROBINSON, et al.,
Plaintiffs,**

v.

**The State of KANSAS, Bill Graves,
et al., Defendant.**

No. CIV. A. 99-1193MLB.

Sept. 14, 2000.

MEMORANDUM AND ORDER

BELOT, District Judge.

Plaintiffs have filed this multi-count complaint against the State of Kansas, its governor, and two education officials,[1] claiming two specific provisions of the State's School District Finance and Quality Performance Act, K.S.A. 72-6405 *et seq.*, create a discriminatory disparate impact against the State's minority students, non-U.S. origin students, and disabled students. Plaintiffs claim the Act's provision for "low enrollment weighting" and "local option budgets" results in less funding per pupil in those schools in which minority, non-U.S. origin and disabled students are disproportionately enrolled. Plaintiffs claim the Act therefore violates Title VI, 42 U.S.C. § 2000d, the Rehabilitation Act of 1973, 29 U.S.C. § 703 *et seq.*, and the plaintiffs' rights to Due Process and Equal Protection under the Fourteenth Amendment.[2] Plaintiffs seek prospective

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[1] Defendant Linda Holloway is the chairperson of the Kansas State Board of Education (Doc. 1 ¶ 20). Defendant Andy Tompkins is the commissioner of the Kansas State Department of Education (Doc. 1 ¶ 21).

[2] Originally, Unified School Districts Nos. 443 and 305 were named as plaintiffs. Plaintiffs subsequently voluntarily dismissed the school districts. Plaintiffs also voluntarily dismissed their claims under the

injunctive relief, specifically that the court order defendants to revise Kansas' school finance law to comply with federal law (Doc. 1 at 14).[3]

Defendants move to dismiss plaintiffs' complaint in its entirety. Two separate motions were filed: one on behalf of defendants Holloway and Tompkins (Doc. 12), the other on behalf of the State of Kansas and Governor Graves (Doc. 14). All parties incorporate the arguments made in the others' brief (Doc. 13 at 22 n.64; Doc. 15 at 32).

The United States moved to intervene (Doc. 32; Doc. 36 (granting motion)) and filed two amicus curiae briefs opposing defendants' motions (Docs. 34, 35).

STANDARDS PERTAINING TO A MOTION TO DISMISS

For purposes of a Rule 12(b)(6) motion, the court must assume the truth of all well-pleaded facts in plaintiffs' complaint and view them in a light most favorable to the plaintiffs. *See Zinermon v. Burch,* 494 U.S. 113, 118 (1990); *Swanson v. Bixler,* 750 F.2d 810, 813 (10th Cir. 1984) ("All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true."). Plaintiffs need only plead minimal factual allegations on those

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Kansas Constitution. (Docs. 41 and 44). Throughout plaintiffs' responses to defendants' motions, plaintiffs correct and clarify the claims made in their complaint. For example, only pursuing the constitutional claims against the individual defendants, pursuing claims under 42 U.S.C. § 1983, etc. Plaintiffs have also requested leave to amend their complaint to include a claim under the Americans with Disabilities Act. Plaintiffs shall move to amend their complaint in accordance with this opinion within 10 days of the filing of this order.

[3] In their brief opposing defendants' motion, however, plaintiff state they are willing to amend their complaint to state that the injunctive relief they seek is prohibiting defendants from enforcing a state law found to be violative of federal law. In the interest of federal-state comity, the court strongly urges plaintiffs to include such an amendment in a forthcoming motion to amend.

material elements that must be proved. *See Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir. 1991). Allegations of conclusions or opinions are not sufficient, however, when no facts are alleged by way of the statement of the claim. *See Bryan v. Stillwater Bd. Realtors,* 578 F.2d 1319, 1321 (10th Cir. 1977). The court must view all reasonable inferences in favor of the plaintiffs, and the pleadings must be construed liberally. *See id.; Lafoy v. HMO Colorado,* 988 F.2d 97, 98 (10th Cir. 1993); Fed. R. Civ. P. Rule 8(a).

The court may not dismiss a cause of action for failure to state a claim "unless it appears beyond a doubt that the plaintiff[s] can prove no set of facts in support of the theor[ies] of recovery that would entitle [them] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *see also Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Kansas,* 927 F.2d 1111, 1115 (10th Cir. 1991); *Grider v. Texas Oil & Gas Corp.,* 868 F.2d 1147, 1148 (10th Cir. 1989). The issue is not whether plaintiffs will ultimately prevail on their claims, but whether they are entitled to offer evidence to support their claims. *See Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

THE COMPLAINT

Plaintiffs are minority, non-U.S. origin, and disabled students attending school districts in Dodge City and Salina, Kansas (Doc. 1 ¶¶ 1-17). The State funds its school districts pursuant to the School District Finance and Quality Performance Act, Kan. Stat. Ann. 72-6405 *et seq.* The Act sets forth a statutory funding formula under which the State determines the amount of funding allotted to each school district (Doc. 1 ¶ 24). According to plaintiffs' complaint, the State receives federal funds from education programs administered by the federal government and such funds are disbursed to the school districts pursuant to the statutory funding formula (Doc. 1 ¶ 25).

Under the statutory funding formula, each school district receives a set amount of money per student enrolled in the

district (Doc. 1 ¶ 26). A statutory base rate is adjusted by several factors, two of which are at issue in this litigation: "low enrollment weighting" and "local option budgets" (Doc. 1 ¶¶ 27, 33). Low enrollment weighting provides additional funds per student in school districts with fewer than 1725 students (Doc. 1 ¶ 27). Additionally, the school funding act permits individual school districts to pass local option budgets to supplement state funding. To do so requires the levying of additional taxes in the district and is sometimes dependent on the approval of residents in the district (Doc. 1 ¶ 33). Plaintiffs claim a "direct correlation exists between the median income and property values in a school district and that district's ability to raise funds through a [local option budget]. School districts with comparatively high median incomes and property values raise more funds through [local option budgets] than those with comparatively low incomes and property values." (Doc. 1 ¶ 33).

Plaintiffs allege minority students, non-U.S. origin students and disabled students are disproportionately enrolled in comparatively low wealth school districts that are also ineligible for low enrollment weighting. Thus, such students disproportionately receive less funding per pupil on a state-wide basis and, as a result, fewer educational opportunities than white, U.S. origin and non-disabled students (Doc. 1 ¶¶ 28-30, 34-36).

THE ELEVENTH AMENDMENT

Defendants argue the Eleventh Amendment of the United States Constitution bars plaintiffs' suit.[4] The Eleventh Amendment provides that "[t]he Judicial power of the

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[4] Defendants move to dismiss plaintiffs' complaint under Fed. R. Civ. P. Rule 12(b)(6). An argument that the Eleventh Amendment bars the action, however, is in the nature of a challenge to the court's subject matter jurisdiction and is therefore analyzed under Rule 12(b)(1). *See Elephant Butte Irrigation Dist. v. Dept. of the Interior,* 160 F.3d 602, 607 (10th Cir. 1998), *cert. denied,* 526 U.S. 1019 (1999).

United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Supreme Court interprets the Amendment to mean that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan,* 415 U.S. 651, 663 (1974).

Three exceptions to Eleventh Amendment immunity exist:

> First, a state may not assert an Eleventh Amendment defense where Congress has properly abrogated its immunity. *See Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 55 (1996). Second, a state may waive its sovereign immunity by consenting to suit in federal court. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 119 S. Ct. 2219, 2223 (1999). Third, a private party may sue a state officer for prospective injunctive or declaratory relief from an ongoing violation of the Constitution or federal laws. *See Ex parte Young,* 209 U.S. 123, 159-60 (1908); *see also Alden v. Maine,* 527 U.S. 706 (1999) (affirming the continuing vitality of *Ex parte Young*).

MCI Telecommunications Corp. v. Public Serv. Comm. of Utah, 216 F.3d 929, 935 (10th Cir. 2000).

A. The State of Kansas as a Defendant

In their response brief, plaintiffs write that "[t]he State of Kansas and Governor Graves can be sued under Title VI and the Rehabilitation Act. Governor Graves and defendants Holloway and Tompkins can be sued under 42 U.S.C. § 1983 on plaintiffs' federal constitutional claims." (Doc. 27 at 4). The court understands plaintiffs' statement to mean that plaintiffs do not wish to pursue their Equal Protection and Due Process claims against the State. The court also notes that in their response to Defendants

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Holloway and Tompkins' motion to dismiss, plaintiffs request leave to amend their Complaint to include a claim under Title II of the Americans with Disabilities Act (Doc. 31 at 13). For purposes of this opinion, the court will assume plaintiffs intend to pursue this claim against the State and will address such a claim accordingly. *See* discussion, *infra,* at 14.

As to defendants' argument that the State is protected from this lawsuit under the Eleventh Amendment, plaintiffs reply that two exceptions to the State's Eleventh Amendment immunity exit. First, plaintiffs argue that by accepting federal funds, the State has waived its sovereign immunity. Second, plaintiffs argue Congress abrogated the State's sovereign immunity by its enactment of 42 U.S.C. § 2000d-7(a)(1). The court will address each of the arguments in turn.

1. Title VI

a. Waiver by accepting federal funds

Plaintiffs argue the State waived its Eleventh Amendment immunity as to Title VI by accepting federal educational funds. A state may waive its Eleventh Amendment immunity in one of two ways. First, a state may voluntarily invoke the jurisdiction of a federal court. *See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 675 (1999). This has not occurred here. Second, a state waives its immunity if it "makes a clear declaration that it intends to submit itself to [a federal court's] jurisdiction." *Id.* (internal quotation marks and citation omitted). The test for determining whether a waiver has occurred is "a stringent one." *Id.* A state may make such a "clear declaration" in one of two ways: expressly and impliedly. A state may expressly waive its immunity through a state statute or constitutional provision. *See In re Innes,* 184 F.3d 1275, 1278 (10th Cir. 1999), *cert. denied,*

--- U.S. ----, 120 S. Ct. 1530 (2000).[5] A state may impliedly waive its immunity so long as the implied declaration is clear and "altogether voluntary." *See College Sav. Bank,* 527 U.S. at 679, *MCI Telecommunications,* 216 F.3d at 935. A waiver is voluntary only when Congress threatens a state with the denial of a "gift or gratuity." *See College Sav. Bank,* 527 U.S. at 686. On the other hand, if Congress threatens a state with a "sanction" for such a refusal, the waiver is not truly voluntary. *See id.*[6]

As an illustration of what constitutes a "gift or gratuity," the Court discussed its decision in *South Dakota v. Dole,* 483 U.S. 203 (1987). *See College Sav. Bank,* 527 U.S. at 686. *Dole* involved South Dakota's constitutional challenge of a federal statute's conditioning states' receipt of federal highway funds on adoption of a minimum drinking age of 21. *See Dole,* 483 U.S. at 205. The Court held "that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take,

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[5] In *In re Innes,* the Tenth Circuit determined that neither a Kansas statute, nor a Kansas constitutional provision expressly waived the state's Eleventh Amendment immunity. *See Innes,* 184 F.3d at 1278-79. There is no claim that such a waiver has occurred in this case.

[6] The Supreme Court, in *College Savings Bank,* added that a gift may become a sanction if the "gift," threatened to be withheld, is large. *See id.* at 685. Defendants, in their reply brief, occasionally use the buzz word "coercion" in what the court assumes is an attempt to argue this point. The court, however, finds this argument lacking because defendants do not even try to explain how the State's receipt of the federal education funds is so large as to cross the threshold point mentioned in *College Savings.* Furthermore, the Tenth Circuit has recently observed that this "coercion theory," discussed in *College Savings Bank,* was merely dicta. *See MCI Telecommunications Corp. v. Public Serv. Comm. of Utah,* 216 F.3d 929, 938-39 n.6 (10th Cir. 2000). The Tenth Circuit has also opined that "the coercion theory is unclear, suspect, and has little precedent to support its application." *Kansas v. United States,* 214 F.3d 1196, 1202 (10th Cir. 2000).

and that acceptance of the funds entails an agreement to the actions." *College Sav. Bank,* 527 U.S. at 686 (citing *Dole*).

Congress' power to condition a state's receipt of federal funds on its waiver of Eleventh Amendment sovereignty is incident to its powers under the Spending Clause of Article I, § 8, clause 1. *See Dole,* 483 U.S. at 207. This power is substantial and Congress may accomplish "objectives not thought to be within Article I's 'enumerated legislative fields.'" *Id.* (quoting *United States v. Butler,* 297 U.S. 1, 66 (1936)). Such a waiver, however, requires an "unequivocal indication" that a state has consented to federal jurisdiction, either" 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman v. Jordan,* 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.,* 213 U.S. 151, 171 (1909)). A federal statute must manifest a "clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 247 (1985).

b. 42 U.S.C. § 2000d-7

42 U.S.C. § 2000d-7 provides that "[a] State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance."[7] 42 U.S.C.

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[7] Section 2000d-7 was enacted pursuant to the Rehabilitation Act Amendments of 1986 in response to the United States Supreme Court decision *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234 (1985), in which the Court held that Congress had not unmistakably expressed its intent to abrogate the States' Eleventh Amendment immunity under the Rehabilitation Act. *See Lane v. Pena,* 518 U.S. 187, 197-98 (1996). The

§ 2000d-7(a)(1). Defendants make no argument that the State of Kansas has not received federal education funds. Thus, the question is "whether [42 U.S.C. § 2000d-7] provide[s] unambiguously that [the State], by agreeing to receive federal education funds under Title [IV], has waived its Eleventh Amendment immunity." *Litman v. George Mason Univ.*, 186 F.3d 544, 551 (4th Cir. 1999), *cert. denied*, --- U.S. ----, 120 S. Ct. 1220 (2000).

The Supreme Court has noted that by enacting section 2000d-7, "Congress sought to provide the sort of unequivocal waiver" the Court's opinion in *Atascadero* demanded. *See Lane v. Pena*, 518 U.S. 187, 198 (1996). The Eleventh Circuit has concluded that § 2000d-7(a)(1)'s "plain language manifests an unmistakable intent to condition federal funds on a state's waiver of sovereign immunity" under Title VI. *See Sandoval v. Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), *petition for cert. granted*, --- U.S. ----, 121 S. Ct. 28 (2000). Furthermore, all but one of the courts of appeals that have considered whether the language in § 2000d-7 waives a state's immunity once the state receives federal funds, have decided the issue in the affirmative. *See Litman*, 186 F.3d at 551 (concluding § 2000d-7 conditions a state's receipt of Title IX funds on an unambiguous waiver of Eleventh Amendment immunity); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000) (determining "Rehabilitation Act is enforceable in federal court against recipients of federal largess"); *Little Rock School Dist. v. Mauney*, 183 F.3d 816, 831-32 & n.12 (8th Cir. 1999) (characterizing as "an unambiguous waiver of immunity" a parallel provision under the IDEA's § 1403); *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997) (determining that § 2000d-7(a)(1) manifests a clear intent to condition a state's receipt of federal funds under

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effective date of the amendment was October 21, 1986. *See* 42 U.S.C. § 2000d-7(b).

the Rehabilitation Act on its consent to waive its Eleventh Amendment immunity).[8] The only opinion to conclude otherwise is *Bradley v. Arkansas Dept. of Ed.*, 189 F.3d 745, 757-58 (8th Cir. 1999). That portion of the opinion, however, has been vacated and reheard *en banc*. *See Jim C. v. Arkansas Dept. of Ed.*, 197 F.3d 958 (8th Cir. 1999) (argued Jan. 14, 2000).

In their reply brief, defendants make what the court assumes to be a generalized federalism argument with respect to plaintiffs' theory of implied waiver of immunity. The Tenth Circuit has recently addressed such an argument from the State of Kansas in a case involving Kansas' challenge to the conditions imposed under a congressional act on the State's acceptance of federal welfare funds:

> Kansas has invited us to forge new ground in Spending Clause jurisprudence by invalidating the child support enforcement conditions Congress attached to its social welfare funding program. In doing so, it asks that we expand the concept of "coercion" as it applies to relations between the state and federal governments, and find a large federal grant accompanied by a set of conditional requirements to be coercive because of the powerful incentive it creates for the states to accept it. We decline the invitation. In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the IV-D requirements so disagreeable, it is

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[8] The Tenth Circuit has not yet had the opportunity to decide whether § 2000d-7 is sufficient to waive a state's immunity under Title VI or the Rehabilitation Act. The court has merely noted that it is "aware" of the decisions holding that § 2000d-7 is indeed sufficient. *See In re Innes*, 184 F.3d 1275, 1282 (10th Cir. 1999). In *Innes*, Kansas State University entered into a contract with the Department of Education to participate in the federal Perkins Loan program. *See id.* at 1277. That agreement explicitly provided that KSU agreed to abide by specific department regulations. *See id.* at 1281-82. The court concluded this specific agreement waived KSU's Eleventh Amendment immunity. *See id.* at 1282.

> ultimately free to reject both the conditions and the funding, no matter how hard that choice may be . . . . Put more simply, Kansas' options have been increased, not constrained, by the offer of more federal dollars.

Kansas v. United States, 214 F.3d 1196, 1203-04 (10th Cir. 2000).

Defendants argue that because the funds alleged to be distributed in a discriminatory fashion are not the actual federal funds disbursed to the State spoken of in Title VI, Congress' conditioning receipt of the federal funds on the state's waiver of immunity is unconstitutional. In *South Dakota v. Dole,* 483 U.S. 203 (1987), however, the United States Supreme Court explained that for a condition to be a permissible congressional exercise under the Spending Clause, the conditions should be merely *related* "'to the federal interest in particular national projects or programs.'" *See id.* at 207 (quoting *Massachusetts v. United States,* 435 U.S. 444, 461 (1978) (plurality opinion)). No dollar-for-dollar accounting need be made.

Title VI prohibits discrimination "under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Title VI defines "program or activity" as "the entity of such State or local government that distributes such assistance and each such department or agency . . . to which the assistance is extended, in the case of assistance to a State or local government." *Id.* at § 2000d-4a(B). The regulations apply to the State of Kansas because the state receives federal funds from the Department of Education. *See* 34 C.F.R. § 100.2 (1999). The discrimination prohibited is discrimination in education. *See id.* at § 100.3(2). The court finds the condition and the federal interest are sufficiently related to be constitutional. *See also Kansas v. United States,* 214 F.3d 1196, 1200 (10th Cir. 2000) (noting the lack of any recent Supreme Court decisions invalidating a congressional funding condition and

listing the several Supreme Court decisions upholding conditions placed on the receipt of federal funds).

Plaintiffs further argue the Eleventh Amendment is no bar to their Title VI claim against the State of Kansas because Congress abrogated the state's immunity by its enactment of 42 U.S.C. section 2000d-7. Defendants respond that although Congress has unequivocally expressed its intent to abrogate the states' immunity for Title VI claims, Congress was not acting pursuant to a valid exercise of power. Neither the United States Supreme Court, nor the Tenth Circuit has decided whether Congress's abrogation was a valid exercise of power under section 5 of the Fourteenth Amendment. Because the court has determined the State of Kansas, by accepting federal funds, has effectively waived its Eleventh Amendment immunity, the court need not address the issue of abrogation. *Cf. Martin v. Kansas,* 190 F.3d 1120, 1126 (10th Cir. 1999) (stating that because the state did not waive its immunity under the ADA, the court must determine whether Congress permissibly abrogated the state's immunity).

2. Rehabilitation Act

As with their Title VI claim, plaintiffs argue the State of Kansas waived its Eleventh Amendment immunity under § 504 of the Rehabilitation Act by accepting federal funds. For the same reasons 42 U.S.C. § 2000d-7 properly conditioned the state's acceptance of federal funds to its waiver of immunity under Title VI, § 2000d-7 also conditioned the receipt of such funds on the state's waiver of its immunity to a Rehabilitation Act claim. Furthermore, as with the Title VI claim, because the court determines the state's immunity is waived with respect to such claim, the court need not address whether Congress properly abrogated the state's immunity. *See J.B. ex rel. Hart v. Valdez,* 186 F.3d 1280, 1287 (10th Cir. 1999) ("Furthermore, as the Eleventh Amendment poses no bar to any claim in this action, we need not address whether . . . Section 504 of the

Rehabilitation Act . . . contain[s a] valid statutory abrogation[ ] of Eleventh Amendment immunity under § 5 of the Fourteenth Amendment.").

3. Americans with Disabilities Act

In their response to the motion to dismiss by defendants Holloway and Tompkins, plaintiffs request leave to amend their Complaint to assert a claim under the Americans with Disabilities Act (Doc. 31 at 13). Should plaintiffs do so, the court assumes, for purposes of this motion to dismiss, that plaintiffs would wish to assert such a claim against the State of Kansas. In that case, the Eleventh Amendment would be no bar because the Tenth Circuit has recently decided Congress properly abrogated the states' immunity from suit under the ADA. *See Martin v. Kansas,* 190 F.3d 1120, 1128 (10th Cir. 1999) (holding the ADA was a permissible exercise of Congress' Fourteenth Amendment, Section 5 enforcement powers).[9]

B. The Individual Defendants in their Official Capacity

As plaintiffs and amicus point out, even in the absence of either waiver or valid abrogation, plaintiffs may maintain their action against the individual defendants in their official

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[9] The court notes, however, the Third and Seventh Circuits have come to the opposite conclusion. *See Lavia v. Dept. of Corrections,* 224 F.3d 190, ---, 2000 WL 1121553 at *1 (3d Cir. 2000); *Erickson v. Board of Governors for N.E. Ill. Univ.,* 207 F.3d 945, 952 (2000), *petition for cert. filed,* --- U.S. ----, 69 U.S.L.W. 3003 (U.S. June 26, 2000) (No. 99-2077). The Third Circuit decided its case in light of the recent Supreme Court decision *Kimel v. Florida Bd. of Regents,* 528 U.S. 62 (2000) in which the Court held the Age Discrimination in Employment Act was not a valid exercise of Congress' § 5 enforcement power and, therefore, did not validly abrogate the States' Eleventh Amendment immunity. The Third Circuit recognized the Tenth Circuit's contrary conclusion, but noted that *Martin* was decided pre-*Kimel. See Lavia,* 224 F.3d at 202, & n.3. *But see Davis v. Utah State Tax Comm'n,* 96 F. Supp. 2d 1271, 1279-84 (D.Utah 2000) (reasoning the court is not only bound by Tenth Circuit precedent in *Martin,* but that *Kimel* would not change the result).

capacity under the doctrine of *Ex parte Young*. *See Elephant Butte Irrigation Dist. v. Dept. of the Interior,* 160 F.3d 602, 607 (10th Cir. 1998) (citing *Young,* 209 U.S. 123 (1908)). The *Ex parte Young* doctrine is not an exception to the Eleventh Amendment, but rather is a judicially created legal fiction in which the lawsuit is against state officials, not the state. *See Elephant Butte,* 160 F.3d at 607. Although a state official, named in his or her official capacity is considered to be acting on behalf of the state and thus is immune from suit under the Eleventh Amendment, *see Kentucky v. Graham,* 473 U.S. 159, 165-66 (1985), *Ex parte Young* "creates a narrow exception to this general rule." *Elephant Butte,* 160 F.3d at 607. The Eleventh Amendment does not bar a suit against a state official in federal court which seeks only prospective equitable relief for violations of federal law. *See id.* at 607-08 (citing *Ex parte Young,* 209 U.S. at 159-60).[10]

Defendants do not argue against the continuing validity of the *Ex parte Young* doctrine,[11] but rather contend that plaintiffs' lawsuit implicates special state sovereignty issues and is accordingly barred under the recent United States Supreme Court decision *Idaho v. Coeur d'Alene Tribe of*

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[10] The Tenth Circuit recently explained the application of the *Ex Parte Young* doctrine:

> [W]hen a suit names a state official as the defendant, the Eleventh Amendment still bars the action if "the state is the real, substantial party in interest." Whether the state is the real party in interest turns on the relief sought by the plaintiff. Suits that seek prospective relief are deemed to be suits against the official, while suits that seek retroactive relief are deemed to be suits against the state.

Powder River Basin Resource Council v. Babbitt, 54 F.3d 1477, 1483 (10th Cir. 1995) (quoting *Ford Motor Co. v. Dept. of Treasury,* 323 U.S. 459, 464 (1945)).

[11] Indeed, the United States Supreme Court has recently affirmed the doctrine by stating that it does not "question the continuing validity of the *Ex parte Young* doctrine." *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 269 (1997).

Idaho, 521 U.S. 261 (1997).[12] *Coeur d'Alene* limited the *Ex parte Young* doctrine in that the Court held that prospective injunctive relief may also be barred by the Eleventh Amendment when such relief would be as much of an intrusion on state sovereignty as an award of money damages. *See ANR Pipeline Co. v. Lafaver,* 150 F.3d 1178, 1190 (10th Cir. 1998), *cert. denied,* 525 U.S. 1122 (1999) (citing *Coeur d'Alene Tribe*).

Subsequently, the Tenth Circuit interpreted the *Coeur d'Alene Tribe* opinion to impose a new requirement into an *Ex parte Young* analysis. *See id.* The Tenth Circuit observed that the federal courts must first "examine whether the relief being sought against a state official implicates special sovereignty interests." *Id.* (internal quotation omitted). "If so, [the court] must then determine whether that requested relief is the functional equivalent to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment." *Id.* (internal quotation omitted). To this effect, the Tenth Circuit stated that a

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[12] Defendants State of Kansas and Governor Graves' brief in support of their motion is somewhat difficult to follow. In section I.B.1.b.i, defendants appear to argue the *Ex parte Young* doctrine is inapplicable because "plaintiff's [sic] are not seeking to prevent Governor Graves, in his official capacity, from future violations of the Fourteenth Amendment. The plaintiff's [sic] are asking the Governor to rewrite the school finance law of the State of Kansas." (Doc. 15 at 19). Defendants then cite as authority *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89 (1984) and *ANR Pipeline Co. v. Lafaver,* 150 F.3d 1178, 1188 (10th Cir. 1998) for the proposition that a federal court cannot instruct a state official on how to conform their conduct to *state* law. (Doc. 15 at 20). The organization of defendants' brief confuses the court because these are two entirely different arguments. In any event, the arguments of *Pennhurst* and *ANR Pipeline* are moot because plaintiffs have agreed to voluntarily dismiss their state constitutional claims. (Doc. 27 at 14 n.9). To the extent defendants argue the court cannot order the individual defendants to do an affirmative act, the court finds such an argument to be more appropriately addressed *infra* under the Tenth Amendment section.

federal court "must not extend the *Ex parte Young* doctrine to allow a suit for prospective equitable relief when that relief would be just as intrusive, if not more so, into core aspects of a state's sovereignty." *Id.*

Defendants State of Kansas and Governor Graves' unnecessarily long and verbose argument can be summarized to be that the State's ability to finance its school system (or, as defendants put it, "to write its laws allocating its resources to train the future leaders of this state" (Doc. 15 at 22)) implicates a "special sovereignty interest." Thus, say defendants, not even the legal fiction of *Ex parte Young* can save plaintiffs' lawsuit. The court does not agree.

In support of their argument, defendants rely extensively on *Coeur d'Alene Tribe* and *ANR Pipeline v. Lafaver.* In *Coeur d'Alene Tribe,* the tribe sought a declaratory judgment against the state establishing its right to quiet enjoyment of Lake Coeur d'Alene. *See Coeur d'Alene Tribe,* 521 U.S. at 264-65. The tribe also sought prospective injunctive relief against various state officials to prevent them from exercising any regulatory jurisdiction over the lake. *See id.* at 265. A majority of the fractured court agreed the *Ex parte Young* doctrine could not save the tribe's suit. *See id.* at 287-88 (Kennedy, J., majority opinion). The majority instead determined that the tribe's requested relief would be the "functional equivalent" of a quiet title action against the state which would "implicate[ ] special sovereignty interests." *Id.* at 281 (Kennedy, J., majority opinion). In so doing, the Court took pains to detail the doctrines of state sovereignty over navigable waters, going as far back as Justinian's *Institutes.* The Court reviewed the importance over such a law from the English common law to the importation of that law into the American legal system. *See id.* at 284-85.

In *ANR Pipeline v. Lafaver,* 150 F.3d 1178 (10th Cir. 1998), *cert. denied,* 525 U.S. 1122 (1999), the Tenth

Circuit, relying on *Coeur d'Alene Tribe,* found that the state's power to assess and levy personal property taxes on property located within its borders implicated special sovereignty interests. *See id.* at 1193. Accordingly, the court barred the plaintiffs from not only requesting damages for prior alleged wrongs, but also from seeking a declaratory judgment and an injunction requiring Kansas to recertify the plaintiffs' property valuations for past and future tax years. *See id.* at 1194. The court determined that such relief would be "'fully as intrusive' into the state's sovereignty as would be a retroactive money judgment against excessive property taxes." *Id.* The court reasoned the plaintiffs' request that the court "rewrite Kansas' property tax code" would undermine the state's sovereign interest because "it is impossible to imagine that a state government could continue to exist without the power to tax." *Id.* at 1193-94.[13]

Defendants' reliance on the findings of *Coeur d'Alene Tribe* and *ANR Pipeline* is misplaced because, as subsequent courts have noted, those opinions were "inextricably bound to the specific facts of the case." *Glazer's Wholesale Drug Co. v. Kansas,* 92 F. Supp. 2d 1228, 1233 (D.Kan. 2000). In the Tenth Circuit, a finding of a "special sovereignty interest" is limited to "those situations that strike at the heart of the state's ability to function." *Id.*

On many occasions since *ANR Pipeline,* the Tenth Circuit has limited its holding to the facts of the case. In *Buchwald v. Univ. of New Mexico Sch. of Medicine,* 159 F.3d 487 (10th Cir. 1998), the plaintiff, claiming the state university

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[13] It should be noted that in *ANR Pipeline* the court found the plaintiffs' request for future tax relief preempted by the Tax Injunction Act, 28 U.S.C. § 1341, which requires all constitutional challenges to state taxation be heard in state court. *See ANR Pipeline,* 150 F.3d at 1191-92 (citing *Seminole Tribe v. Florida,* 517 U.S. 44 (1996) for holding that *Ex parte Young* can not be used to expand plaintiffs' remedies beyond those set by Congress).

unconstitutionally denied her admission based on residency, sought prospective injunctive relief ordering her admission to the medical school. *See id.* at 492. The court, although recognizing the recent limitations imposed on the *Ex parte Young* doctrine by *Coeur d'Alene Tribe* and *ANR Pipeline,* determined the limitations did not apply. *See id.* at 495 n.6. In doing so, the court reasoned "[t]here is certainly no threat that the New Mexico government would cease to exist without [the university's] disputed policy." *Id.*

In *Elephant Butte Irrigation Dist. v. Dept. of the Interior,* 160 F.3d 602 (10th Cir. 1998), *cert. denied,* 526 U.S. 1019 (1999), the court decided that New Mexico's property interest in the right to profits from a land lease did not constitute a special sovereignty interest. *See id.* at 612. In *Branson Sch. Dist. RE-82 v. Romer,* 161 F.3d 619 (10th Cir. 1998), *cert. denied,* 526 U.S. 1068 (1999), the Tenth Circuit rejected the defendants' *Coeur d'Alene Tribe* argument, finding instead that the plaintiffs' requested relief would merely affect only a limited aspect of how the state managed public lands. *See id.* at 632-33. Specifically, the court stated it found it "impossible to say that the distinction between, for example, whether a state must manage its school lands to maximize revenues as opposed to managing the land to produce consistent income over time is a distinction that implicates special sovereignty interest." *Id.* at 632.

The Tenth Circuit later found that a state's control over its employees was not a special sovereignty interest and affirmed the trial court's direction to state officials to reinstate a state employee who had sued under 42 U.S.C. § 1981. *See Ellis v. Univ. of Kansas Med. Ctr.,* 163 F.3d 1186, 1198 (10th Cir. 1999). The court distinguished the facts of that case from the facts of both *Coeur d'Alene Tribe* (sovereign control over lands) and *ANR Pipeline* (state's power to assess and levy personal property taxes on property within its borders). *See id.*

More recently, and under facts more analogous to those at hand, the Tenth Circuit stated "[a] state's interest in administering a welfare program at least partially funded by the federal government is not such a core sovereign interest as to preclude the application of *Ex parte Young.*" *J.B. ex rel. Hart v. Valdez,* 186 F.3d 1280, 1287 (10th Cir. 1999). In a footnote, the court noted that the defendants "only fleetingly mention that this lawsuit affects the state's sovereignty to administer its various child welfare programs and provide no argument or reasoning why this interest should enjoy special status." *Id.* at 1287 n.3.

Like the defendants in *Valdez,* defendants in this case cling to the specific holdings of *Coeur d'Alene Tribe* and *ANR Pipeline* and urge the court to find the state's ability to fund its school districts is a "special sovereign interest." The court cannot do so. Subsequent cases in this circuit make clear the finding of such an interest in *Coeur d'Alene Tribe* and *ANR Pipeline* was the exception rather than the rule. Although defendants argue "a state could [not] continue to exist without the power to write its own laws without the supervision of the federal courts," (Doc. 15 at 23), the court disagrees. As in *Valdez,* the state's school financing is partially funded by the federal government. The state could indeed continue to exist while a federal court examines whether the state is distributing funds in a non- discriminatory manner in compliance with federal laws.[14] The court, accordingly, finds the *Coeur d'Alene Tribe* exception to the doctrine of *Ex parte Young*

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[14] Furthermore, even if the court could find a "special sovereign interest," (which it cannot), *Coeur d'Alene Tribe* 's exception to *Ex parte Young* would still not be applicable because defendants make no argument as to the second inquiry under *ANR Pipeline.* The Tenth Circuit, in *ANR Pipeline,* made clear that *Coeur d'Alene Tribe* 's exception applies only when 1) a special sovereign interest is involved *and* 2) the requested relief is the "functional equivalent" to a quiet title action, divesting the state of all sovereign control over land within its borders. *See ANR Pipeline,* 150 F.3d at 1190.

inapplicable and therefore plaintiffs may proceed with their lawsuit and seek prospective injunctive relief against the individual defendants in their official capacity.

GOVERNOR BILL GRAVES AS A PROPER DEFENDANT

Defendants next argue Governor Bill Graves should be dismissed from the lawsuit because, as an individual, he is not the proper person to effectuate plaintiffs' requested relief. Specifically, defendants argue that "[a]lthough Bill Graves has been sued in his official capacity as Governor of the State of Kansas for prospective injunctive relief, he is still a person and not an entity." (Doc. 15 at 24). Not so.

In *Will v. Michigan Dept. of State Police,* 491 U.S. 58 (1989), the Supreme Court stated that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Id.* at 71 (citing *Brandon v. Holt,* 469 U.S. 464, 471 (1985)). The real party in interest in an official capacity suit is the governmental entity and not the named official. *See Hafer v. Melo,* 502 U.S. 21, 24 (1991). Suits against an individual in his or her official capacity "'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Kentucky v. Graham,* 473 U.S. 159, 165 (1985) (quoting *Monell v. Dept. of Social Servs. of City of New York,* 436 U.S. 658, 690 n.55 (1978)).

In their response brief, plaintiffs mention that they are willing to amend their complaint's prayer for relief to include injunctive relief prohibiting defendants from violating plaintiffs' rights under Title VI, the Rehabilitation Act, the ADA, and the Fourteenth Amendment (Doc. 27 at 15). Under the Kansas Constitution, the Governor of Kansas is responsible for the enforcement of the laws of Kansas. *See* Kan. Const. art. I, § 3. If allowed, plaintiffs' amended complaint will, in essence, be asking that the Governor be prohibited from enforcing a Kansas law, specifically the school financing statute, in a way found by

this court to be unconstitutional or in violation of a federal statute. The governor is the proper party to this action. *Cf. Brown v. Bd. of Ed. of Topeka,* 892 F.2d 851, 887 (10th Cir. 1989) (finding proper the dismissal of governor because lawsuit did not implicate the enforcement of any state statute).

SERVICE ON GOVERNOR BILL GRAVES

Defendants argue the court does not have personal jurisdiction over the Governor because he was not properly served. Defendants contend that because the Governor has been sued in his official capacity, the suit is one against the state and under the applicable federal rule and Kansas statute, service should have been made on the attorney general's office. Plaintiff answers that not only was the Governor personally served, but that service was made at the office of the attorney general as well.

The Governor, whether sued in his individual or official capacity, is an individual. Thus service upon him was proper when he was served personally. *See* Fed. R. Civ. P. Rule 4(e)(1) and (2); Kan. Stat. Ann. 60-304(a). Service was proper. In any event, defendants should be aware that Kansas law provides that substantial compliance with the service of process statute is sufficient. *See* Kan. Stat. Ann. 60-204;[15] *see also Pedi Bares, Inc. v. P & C Food Markets, Inc.*, 567 F.2d 933, 936 (10th Cir. 1977); *Brin v. Kansas,* 101 F. Supp. 2d 1343, 1347 (D.Kan. 2000).

DISPARATE IMPACT CLAIM UNDER TITLE VI

Defendants argue plaintiffs' Title VI claims should be dismissed because plaintiffs "cannot show the challenged

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[15] "In any method of serving process, substantial compliance therewith shall effect valid service of process if the court finds that, notwithstanding some irregularity or omission, the party served was made aware than an action or proceeding was pending in a specified court in which his or her person, status or property were subject to being affected." Kan. Stat. Ann. 60-204.

statutory provisions inflict a significant and unique adverse impact solely on them because of their membership in a protected group." (Doc. 12 at 9). Recognizing plaintiffs' claim is one of disparate impact, defendants argue plaintiffs fail to state a claim because 1) the facts alleged fail to make out a case of causation (Doc. 12 at 11); 2) any alleged inequities apply with equal force to the non- minority students in the districts at issue (Doc. 12 at 13); and 3) the alleged inadequacies in the funding to their districts is not *because of* their protected status (Doc. 12 at 11). Defendants' arguments, however, fail to recognize the nature of a disparate impact claim, a claim recognized by the Tenth Circuit under Title VI.

Section 601 of Title VI of the Civil Rights Act of 1964 provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. Although the Supreme Court has recognized an implied private cause of action under section 601, *see Alexander v. Choate,* 469 U.S. 287, 293-94 (1985); *Guardians Ass'n v. Civil Serv. Comm'n,* 463 U.S. 582, 607 n.27 (1983), the Court has also held that to state such a claim, a plaintiff must establish the funding recipient's discriminatory intent. *See Alexander,* 469 U.S. at 293. *See also United States v. Fordice,* 505 U.S. 717, 732 n.7 (1992); *Elston v. Talladega County Bd. of Educ.,* 997 F.2d 1394, 1405-06 n.11 (11th Cir. 1993).

Section 602 of Title VI empowers agencies providing federal financial assistance to issue "rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance . . . ." 42 U.S.C. § 2000d-1. The Supreme Court has held that such agencies have the

authority to promulgate regulations pursuant to Section 602 which prohibit funding recipients from taking any action that *results* in a disparate impact or produces discriminatory effects on the basis of race, color, or national origin. *See Guardians Ass'n v. Civil Serv. Comm'n,* 463 U.S. 582, 584 n.2 (1983) (White, J.); *id.* at 623 n.15 (Marshall, J.); *id.* at 642-45 (Stevens, Brennan, Blackmun, JJ.); *see also Alexander,* 469 U.S. at 293. The Department of Education has promulgated such a regulation:

> A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided . . . may not . . . utilize criteria or methods of administration **which have the effect of** subjecting individuals to discrimination because of their race, color, or national origin, **or have the effect of** defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

34 C.F.R. § 100.3(b)(2) (1999) (emphasis added).

Although the Supreme Court has yet to decide whether a private right of action exists under the regulation, *see Sandoval v. Hagan,* 197 F.3d 484, 504 (11th Cir.1999), *petition for cert. granted,* --- U.S. ----, 121 S. Ct. 28 (2000), the Tenth Circuit recognizes the regulation as prohibiting actions having a disparate impact and as providing a private right of action. *See Villanueva v. Carere,* 85 F.3d 481, 486 (10th Cir. 1996). *See also Edwards & Assocs., Inc. v. Black & Veatch, L.L.P.,* 84 F. Supp. 2d 1182, 1194-95 n.20 (D.Kan. 2000).

Defendants argue dismissal of plaintiffs' Title VI claim is appropriate because plaintiffs cannot show the state's funding of the school districts inflicts a "unique" adverse impact "because of" their minority status. In essence, defendants argue that because non-minority students also attend the school districts in which plaintiffs are enrolled and plaintiffs receive the same funding per student as the

non-minority students, plaintiffs are unable to prove a disparate impact claim. The court agrees with plaintiffs that defendants' argument "misstates the fundamental nature of disparate impact discrimination." (Doc. 31 at 5).

"To survive a motion to dismiss, all that the plaintiff must do is plead that a facially neutral practice's adverse effects fall disproportionately on a group protected by Title VI." *Powell v. Ridge,* 189 F.3d 387, 394 (3d Cir.), *cert. denied,* 528 U.S. 1046 (1999). In this case, plaintiffs have pled:

1. Under the Act's funding formula, each public school district receives a set amount of money per student enrolled in the district. (Doc. 1 ¶ 26).

2. Public school districts with fewer than 1725 students receive additional funds per student pursuant to low enrollment weighting. (Doc. 1 ¶ 27).

3. Minority students are disproportionately enrolled in mid-size and large school districts which do not qualify for low enrollment weighting and, as a result, receive less funding per student. (Doc. 1 ¶ 28).

4. The Act permits individual school districts to pass local option budgets to supplement state funding. A direct correlation exists between the median income and property values in a school district and that district's ability to raise funds through an LOB. (Doc. 1 ¶ 33).

5. Minority students are disproportionately enrolled in school districts with comparatively low incomes and property values. These districts collect fewer funds through LOBs than districts which enroll disproportionate numbers of white students. (Doc. 1 ¶ 34).

Plaintiffs have pled their disparate impact claim by stating that minority students are disproportionately enrolled in districts which receive less funding per students due to the Act's provision for low enrollment weighting and local option budgets. It does not make sense, then, to compare plaintiffs to the non-minority students enrolled in the same

districts as plaintiffs. The comparison must be made to the other districts, state-wide. Plaintiffs have adequately pled a disparate impact claim.

Embedded within their first argument, defendants briefly argue plaintiffs' Title VI claims should be dismissed because plaintiffs have failed to carry their burden of persuasion (Doc. 12 at 11). Although the Tenth Circuit has not spoken on the various burdens in the context of a Title VI disparate impact claim, the courts of appeals to have decided the issue have generally agreed that the burdens should follow those developed in Title VII cases. *See Powell,* 189 F.3d at 393 (citing cases). In *Bullington v. United Air Lines, Inc.,* 186 F.3d 1301 (10th Cir. 1999), the Tenth Circuit discussed the burden shifting analysis of a disparate impact claim under Title VII. *See id.* at 1312. The court found the plaintiff presented sufficient evidence of a material issue of fact with respect to her prima facie case by presenting statistical information. *See id.* at 1313-14. Accordingly, the court reversed the district court's grant of the defendant's motion for summary judgment. *See id.* at 1315.

Defendants point out plaintiffs fail to prove any facts to support their allegations of disparate impact. Defendants' motion, however, is one for dismissal, not summary judgment. "The burden a Title VI plaintiff must meet to survive a motion to dismiss . . . is much less onerous." *Powell,* 189 F.3d at 394. For purposes of a motion to dismiss, "[a]ll well-pleaded facts and allegations in the complaint must be taken as true and the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *S.A.I., Inc. v. General Elec. Railcar Servs.,* 935 F. Supp. 1150, 1152 (D.Kan. 1996) (internal quotation omitted). Plaintiffs should be allowed to proceed to gather and offer evidence in support of their claims. Defendants' argument

is more appropriately addressed in a motion for summary judgment.

Defendants further argue plaintiffs' claimed disparate impact cannot serve as a basis for their claims because these "societal ills" are not caused by the State's school funding system (Doc. 12 at 12). In their complaint, plaintiffs allege the funding system disproportionately and adversely impacts minorities in that the state spends less money on them, *causing* disproportionately high dropout rates, a disproportionate number of violent acts at school and disproportionately low pass rates and standardized test scores (Doc. 1 ¶¶ 40, 46). Defendants argue dismissal is appropriate because "these societal ills do not result from Kansas' school funding system." (Doc. 12 at 12).

In support of their argument, defendants cite *African American Legal Defense Fund, Inc. v. New York State Dept.*, 8 F. Supp. 2d 330 (S.D.N.Y. 1998). In *African American,* the plaintiff challenged a school funding system that based the funding a district would receive on attendance, rather than enrollment. *See id.* at 334. The plaintiffs alleged this adversely affected minorities because minorities had a higher rate of absenteeism. *See id.* at 338. The plaintiffs alleged the higher rate of absenteeism could be *attributed* to minorities having a higher rate of single parenting, poor housing, and medical problems. *See id.* It was in this context the district court found dismissal appropriate because the school districts were not causing the absenteeism and it was the absenteeism which was causing certain school districts to receive less money per enrolled student. *See id.* at 339.

Unlike the complaint in *African American,* plaintiffs in this case allege that the "societal ills" are *caused* by the way the State funds the school districts. For purposes of a motion to dismiss, such an allegation suffices for pleading disparate impact. Whether plaintiffs can indeed prove such societal ills do exist and whether they exist in

disproportionate numbers in the districts at issue is better addressed in a motion for summary judgment.

§ 504 OF THE REHABILITATION ACT OF 1973

A. Administrative Exhaustion under the IDEA

As an initial matter, the court must determine whether the claims of the disabled plaintiffs must be dismissed on the ground these students failed to exhaust their administrative remedies under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq.[16]

The IDEA requires states to provide the parents of disabled students the right to seek review of any decision concerning their child's education. *See* 20 U.S.C. § 1415. Parents have the right to "present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or **the provision of a free appropriate public education to such child.**" *Id.* at § 1415(b)(6) (emphasis added). Parents then are entitled to an impartial due process hearing conducted by a state or local educational agency. *See id.* at § 1415(f)(1). If the hearing was conducted by a local educational agency, the parent is entitled to an appeal to the state educational agency. *See id.* at § 1415(g). Only after exhaustion of these

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[16] The IDEA sets forth a comprehensive educational scheme and requires each state receiving federal education funds to design an individualized education program ("IEP") for each disabled child. *See Honig v. Doe,* 484 U.S. 305, 311-12 (1988). *Honig* analyzed the act when it was titled the Education of the Handicapped Act. *See Honig,* 484 U.S. at 309. In 1990, the name was changed to the IDEA. *See* Pub. L. No. 101-476, 104 Stat. 1141 (1990). The IEP is a written statement for each child with a disability which sets forth the child's present performance level, goals and objectives, specific services that will enable the child to meet those goals, evaluation criteria and procedures to determine whether the child has met the goals. *See* 20 U.S.C. § 1414(d)(1)(A). Federal funding is conditioned upon a state's compliance with the IDEA's extensive substantive and procedural requirements. *See id.* at § 1412.

procedures may the parent seek review in federal or state court. *See id.* at § 1415(i)(2)(A).

Defendants argue the claims of the disabled plaintiffs must be dismissed because they did not exhaust their administrative remedies under the IDEA. Subsection (*l*) of 20 U.S.C. § 1415 provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, **except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.**

Id. at § 1415(*l*) (emphasis added).[17] Thus, although the IDEA is not the exclusive avenue for the disabled plaintiffs

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[17] Subsection (*l*) was added by Congress in response to the United States Supreme Court decision *Smith v. Robinson,* 468 U.S. 992 (1984) in which the Court limited a disabled student's remedies to those provided under the then-called Education of the Handicapped Act. *See Smith,* 468 U.S. at 1019. Recognizing *Smith* precluded parents from bringing special education cases under the Rehabilitation Act, *see* S. Rep. No 112, 99th Cong., reprinted in 1986 U.S.C.A.A.N 1799-1800, Congress acted "swiftly, decisively, and with uncharacteristic clarity to correct what it viewed as judicial misinterpretation of its intent." *Fontenot v. Louisiana Bd. of Elementary and Secondary Ed.,* 805 F.2d 1222, 1223 (5th Cir. 1986). Congress then passed the Handicapped Children's Protection Act of 1986, P.L. 99-372, 100 Stat. 796, which added subsection (*l*). Congress stated this subsection was added to "reestablish statutory rights repealed by the U.S. Supreme Court in *Smith* and to 'reaffirm, in light of this decision, the viability of section 504 [of the Rehabilitation Act]', 42 U.S.C. [section] 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children." H.R. Rep. No. 296, 99th Cong., 1st Sess. 4 (1985); S. Rep.

to enforce their rights, defendants argue exhaustion of the IDEA's administrative procedures is a prerequisite to their bringing their federal claims in district court.

Assuming Kansas is a state which has subjected itself to the requirements of the IDEA, the court is not persuaded the disabled plaintiffs are precluded from bringing their claims without first seeking administrative review under the IDEA. In *Association for Community Living in Colorado v. Romer,* 992 F.2d 1040 (10th Cir. 1993), the Tenth Circuit established three exceptions to IDEA's exhaustion requirement: 1) when administrative exhaustion would be futile; 2) when it would fail to provide adequate relief; and 3) when "an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law." *See id.* at 1044 (quoting H.R. Rep. No. 296, 99th Cong., 1st Sess. 7 (1985)). Plaintiffs argue that because they allege systemic violations of the federal statutes and seek statewide reforms, they are excused from the administrative exhaustion requirement.

"Administrative remedies are generally inadequate or futile where plaintiffs allege structural or systemic failure and seek systemwide reforms." *Romer,* 992 F.2d at 1044. As the Ninth Circuit Court of Appeals has observed, however, "what constitutes a systemic failure is not so easily defined." *Doe v. Arizona Dept. of Ed.,* 111 F.3d 678, 681 (9th Cir. 1997). In *Romer,* the plaintiffs alleged the Colorado Department of Education's policies regarding extended school days and extended school years discriminated against disabled students in violation of the IDEA and the Equal Protection Clause. The Tenth Circuit held the plaintiffs' failure to exhaust was not excused because the violations alleged and the relief requested targeted not structural or due process concerns, but the

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No. 112, 99th Cong. 2nd Sess. 2-3, *reprinted in* 1986 U.S.C.A.A.N. 1798, 1799-1800.

effect of a single component of the state's educational program on individual children. *See Romer,* 992 F.2d at 1043-45. In *Urban v. Jefferson County School Dist. R-1,* 89 F.3d 720 (10th Cir. 1996), the court held a disabled child was required to exhaust administrative remedies for his challenge to the IEP developed by his school district because his claims directed at a single IEP were not systemic. *See id.* at 725.

Unlike the plaintiffs in *Romer* and *Urban,* the disabled plaintiffs in the instant action do not challenge a state education department's policy or a school district's development of a particular IEP. Instead, plaintiffs seek to have a state statute held to be in violation of federal law. The House Report, relied on by the Tenth Circuit in *Romer* for the exceptions to exhaustion, explained:

> [T]here are certain situations in which it is not appropriate to require the use of due process and review procedures set out in [20 U.S.C. § 1415] of the [IDEA] before filing a law suit.
>
> These include complaints that:(1) it would be futile to use the due process procedures . . .; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies **(e.g., the hearing officer lacks the authority to grant the relief sought)**. . . .

H.R. Rep. No. 296, 99th Cong., 1st Sess. 7 (1985) (emphasis added).

In *Monahan v. Nebraska,* 645 F.2d 592 (8th Cir. 1981), the plaintiff claimed a Nebraska statute violated the Education for All Handicapped Children Act of 1975. The Eighth Circuit held he was not required to first exhaust his administrative remedies because his "claim that the state procedure on its face conflicts with the Federal Act could not be addressed effectively by the state administrative

process." *Id.* at 597. Similarly, in *Kerr Center Parents Ass'n v. Charles,* 897 F.2d 1463 (9th Cir. 1990), the Ninth Circuit held exhaustion of administrative remedies was not required because the plaintiff sought funds which the state legislature had not provided. The court explained "the problem posed by the legislature's failure to appropriate sufficient funds is not one which could have been effectively addressed through the administrative process." *Id.* at 1470.

Like the plaintiffs in *Monahan* and *Kerr,* the disabled plaintiffs in this case challenge the school funding systems in Kansas as set forth in the School District Finance and Quality Performance Act, Kan. Stat. Ann. 72-6405 *et seq.* Thus, the remedies plaintiffs seek address state legislation and not a mere policy of the state's education department or a particular IEP. Adherence to the administrative procedures under the IDEA would be unable to address plaintiffs' claims. Therefore, administrative exhaustion would be futile and is accordingly excused.

B. Disparate Impact Claim under § 504

Defendants move to dismiss plaintiffs' Rehabilitation Act claim on the grounds that 1) the alleged inequities in Kansas' school districts do not occur *solely* on account of plaintiffs' disabilities, 29 U.S.C. § 794(a); and 2) plaintiffs fail to allege defendants acted in bad faith or with gross misjudgment. Both of defendants' arguments fail. The first fails because it is not supported by any Tenth Circuit precedent. The second fails because it has been expressly rejected by Tenth Circuit precedent.

Count III of plaintiffs' complaint alleges Kansas' school funding act has a disproportionate adverse impact on disabled students in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* (Doc. 1 at 11). According to the complaint, disabled students are disproportionately enrolled in school districts which have low local option budgets and receive fewer funds per pupil from the state.

This disparate impact, plaintiffs allege, causes disabled students to have "inferior access to education programs, facilities and transportation, all of which would improve the quality of their education and which are disproportionately available to non-disabled students." (Doc. 1 at 11).

1. 29 U.S.C. § 794(a)

Section 504 of the Rehabilitation Act states: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a). To make out a prima facie case, a plaintiff must prove (1) he is handicapped under the Act; (2) he is "otherwise qualified" to participate in the program; (3) the program receives federal financial assistance; and (4) the program discriminated against him. *See Powers v. MJB Acquisition Corp.,* 184 F.3d 1147, 1151 (10th Cir. 1999); *Woodman v. Runyon,* 132 F.3d 1330, 1337 (10th Cir. 1997). The statute "constitutes an across-the-board requirement of nondiscrimination in all federally assisted programs[,]" including recipients of federal funds for education. *New Mexico Ass'n for Retarded Citizens v. New Mexico,* 678 F.2d 847, 852 (10th Cir. 1982).

In *Alexander v. Choate,* 469 U.S. 287 (1985), the Supreme Court compared the competing interests in whether or not to allow disparate impact claims under the Rehabilitation Act. *See id.* at 295-99. The Court discussed at length the legislative history of the Act and Congress's clear intention to prohibit more than just intentional discrimination of the handicapped. *See id.* at 295-97 ("Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference-of benign neglect."). On the other hand, the Court contemplated the impracticality of allowing any and all

disparate impact claims under the Act. *See id.* at 298-99 ("Because the handicapped typically are not similarly situated to the nonhandicapped, respondents' position would in essence require each recipient of federal funds first to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then to consider alternatives for achieving the same objectives with less severe disadvantage to the handicapped."). With that discussion of the "two powerful but countervailing considerations[,]" the Court declined the opportunity to decide whether disparate impact claims exist under the Rehabilitation Act. *See id.* at 299.

In a footnote, the Court noted the Tenth Circuit recognizes disparate impact claims under the Rehabilitation Act. *See id.* at 297 n.17 (citing *New Mexico Ass'n for Retarded Citizens v. New Mexico,* 678 F.2d 847, 854 (10th Cir. 1982) and *Pushkin v. Regents of Univ. of Colorado,* 658 F.2d 1372, 1384-85 (10th Cir. 1981)). In *New Mexico,* the Tenth Circuit expressly rejected the defendants' argument that disparate treatment of handicapped individuals is a prerequisite to finding discrimination under Section 504. *See New Mexico,* 678 F.2d at 854. The court stated:

> We find no language in the statute or regulations suggesting that proof of disparate treatment is essential to establishing a Section 504 infraction in connection with the educational rights of handicapped children. The handicapped by definition demand vastly different learning programs than the nonhandicapped. Accordingly, the State's disparate treatment argument is rejected.

Id. The *New Mexico* court relied in part on the Tenth Circuit's previous Section 504 case, *Pushkin,* for its decision. *See id.* In *Pushkin,* the court noted:

> [i]t would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate solely on the basis of handicap could be

> shown. Discrimination on the basis of handicap usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons. A claim under § 504 would be analyzed more readily under a "disparate impact" theory where it is claimed that a facially neutral practice has a discriminatory impact on persons within a protected class.

Pushkin, 658 F.2d at 1385 (citing *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971)). Thus, this court, following Tenth Circuit precedent, finds plaintiffs' disparate impact claim cognizable under Section 504 of the Rehabilitation Act. *But see Crocker v. Runyon,* 207 F.3d 314, 321 (6th Cir. 2000) ("There is good reason to believe that a disparate impact theory is not available under the Rehabilitation Act.").

Nevertheless, defendants argue dismissal is appropriate because plaintiffs fail to allege that the denial of benefits is due *solely* because of plaintiffs' disabilities. Defendants reason that "even assuming the alleged inequities exist, they occur only because of the school districts' characteristics and not because of these plaintiffs' disabling conditions." (Doc. 1 at 15). Defendants fail to elaborate on what exactly they mean by "school districts' characteristics," but the court assumes they mean the characteristics which, under the current Kansas school financing act, causes such school districts to receive less funding per student. As with defendants' Title VI argument, defendants once again misconstrue a disparate impact claim.

In support of their argument, defendants rely on the words "solely by reason of his or her disability" in the language of Section 504. (Doc. 12 at 14-15). Defendants reason that plaintiffs suffer the alleged inequities in school benefits, not because of their disability, but because they happen to attend school districts that, under the Kansas

school financing act, receive less funding per pupil. But that is exactly the essence of plaintiffs' disparate impact claim. Plaintiffs allege disabled and handicapped students are disproportionately enrolled in school districts whose "characteristics" cause the districts to receive less funding per student under the Kansas financing act. Of course defendants can argue the reason plaintiffs suffer the inequities is because they attend such school districts. But to grant dismissal of plaintiffs' claim on such an argument would be the equivalent to stating that a disparate impact claim is not cognizable under the Act, a position the Tenth Circuit does not take.

Defendants do not cite to any Tenth Circuit opinions for their argument that the statute's language "solely by reason of" limits a plaintiff's claim of disparate impact under the Rehabilitation Act. Defendants do cite a D.C. Circuit opinion, *Crandall v. Paralyzed Veterans of America,* 146 F.3d 894 (D.C.Cir. 1998). *Crandall,* however, involved a single employee's suit against his former employer after the employee was terminated for "multiple acts of rudeness to fellow employees and outside groups." *See id.* at 895. The plaintiff claimed a disability, manic depression, caused his rudeness and therefore his termination was in violation of Section 504. *See id.* His employer, however, had neither actual nor constructive notice of his disability when it fired him. *See id.* Thus, the court found the Rehabilitation Act did not cover the plaintiff's termination because the plaintiff could not prove he was fired *solely by reason of* his disability. Specifically, the court stated:

> In any event, § 504 prohibits only discriminatory acts performed "solely by reason of" the plaintiff's handicap. The courts of appeals have overwhelmingly agreed that for this causal link to be shown the employer must have acted with an awareness of the disability itself, and not merely an awareness of some deficiency in the

> employee's performance that might be a product of an unknown disability.

Id. at 896-97. The above-cited language is simply inapplicable to a disparate impact claim.

2. Bad Faith

Defendants next argue plaintiffs' § 504 claim should be dismissed because plaintiffs have failed to allege defendant acted with bad faith or gross misjudgment (Doc. 12 at 15). Pleading bad faith, however, is not required because plaintiffs do not ask for compensatory damages.

In *Pushkin v. Regents of Univ. of Colorado,* 658 F.2d 1372 (10th Cir. 1981), the defendants argued that the trial court's finding they did not act in bad faith required the court to rule in their favor on the Section 504 claim. *See id.* at 1384. The Tenth Circuit disagreed. Although the court recognized that bad faith or a discriminatory intent is required for an Equal Protection claim, *see id.* (citing *Washington v. Davis,* 426 U.S. 229 (1976)), such a requirement could not be imputed into the language of the Rehabilitation Act. *See id.* Recently, the Tenth Circuit held that a plaintiff must plead and prove intentional discrimination in order to receive compensatory damages. *See Powers v. MJB Acquisition Corp.,* 184 F.3d 1147, 1153 (10th Cir. 1999). By negative implication, then, it can be assumed the court was also stating that intent need not be pleaded nor proved if the plaintiff does not seek such a monetary award.

In support of their argument that a claim under the Rehabilitation Act requires an allegation of bad faith, defendants rely on language of an Eighth Circuit opinion, *Monahan v. Nebraska,* 687 F.2d 1164 (8th Cir. 1982). In *Monahan,* however, the alleged defective state law had, prior to the appeal, been cured and therefore the plaintiff's claim for prospective injunctive relief was held moot. *See id.* at 1169. The plaintiff argued his claim for damages under the Rehabilitation Act was not mooted. *See id.* It was

in this context that the Eighth Circuit stated that *liability* under the Act required a showing of bad faith or gross misjudgment. Specifically, the court stated that it did "not read § 504 as creating general tort liability for educational malpractice. . . ." *Id.* at 1170.[18]

In their reply brief, defendants offer three additional arguments warranting dismissal of plaintiffs' Rehabilitation Act claim (Doc. 41 at 7). The court will not address new arguments in a reply brief. *See State Farm Fire & Cas. Co. v. Mhoon,* 31 F.3d 979, 984 n.7 (10th Cir. 1994); *Headrick v. Rockwell Int'l Corp.,* 24 F.3d 1272, 1277-78 (10th Cir. 1994); *Codner v. United States,* 17 F.3d 1331, 1332 n.2 (10th Cir. 1994). Furthermore, defendants do not support their arguments with any authority. Failure to press a point by supporting it with pertinent authority forfeits the point. *See Phillips v. Calhoun,* 956 F.2d 949, 953-54 (10th Cir. 1992).

EQUAL PROTECTION AND DUE PROCESS

Plaintiffs' counts IV and V claim Kansas' school funding act violates their Fourteenth Amendment rights to Equal Protection and Due Process. Defendants move to dismiss these claims arguing plaintiffs have not sufficiently alleged they have been deprived of a fundamental right and, as a matter of law, the challenged provisions of the state act bear a rational relationship to a legitimate state purpose. The court agrees that the "rational relationship" standard governs plaintiffs' claims (as opposed to a heightened standard of

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[18] Furthermore, as plaintiffs point out, at least one federal district court has opined that the language of *Monahan* is no longer good law in light of the 1986 amendments to the Education of the Handicapped Act. *See Howell v. Waterford Public Schools,* 731 F. Supp. 1314, 1318 (E.D.Mich. 1990). *See also* discussion, *supra,* note 17. The court, however, notes that the Eighth Circuit has recently reaffirmed *Monahan*'s "bad faith or gross misjudgment" language in a case involving a plaintiff's claim for damages. *See Heidemann v. Rother,* 84 F.3d 1021, 1032 (8th Cir. 1996).

review). Dismissal at this point, however, would be inappropriate.

In their complaint, plaintiffs allege Kansas' school financing act violates their right to equal protection because the act "treats similarly situated students differently, depending on the number of students enrolled in their school districts and the relative wealth of those school districts." (Doc. 1 ¶ 57). Plaintiffs also claim the act deprives them of substantive due process rights (Doc. 1 ¶ 62). Plaintiffs' complaint alleges defendants lack a rational basis for setting the low enrollment weighting threshold at 1725 students or for the state's "abdicat[ing] its constitutional duty to provide suitable funding for public school" through the local option budgeting. (Doc. 1 ¶¶ 59, 63).

Under the Equal Protection Clause, "if a law neither burdens a fundamental right nor targets a suspect class, [the court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer v. Evans,* 517 U.S. 620, 631 (1996).[19] Plaintiffs argue not that

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[19] Similarly, the Due Process Clause "also provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997). If the right asserted is not a fundamental one, the Clause only requires the state law "be rationally related to legitimate government interests." *Id.* at 728. Although defendants argue *Rodriguez* dictates dismissal of both plaintiffs' Equal Protection and Due Process claims, both their and plaintiffs' arguments center around precedent discussing only Equal Protection claims. However, as will be discussed below, because a fundamental right has not been sufficiently alleged, both claims require application of the rationally related standard. Thus, the court finds it appropriate that discussion of the Due Process claim is subsumed in the court's analysis of the Equal Protection claim. The parties are warned, however, such an analysis is only appropriate for purposes of this motion to dismiss. In a later stage of this litigation, such as a motion for summary judgment, the parties must do a better job at distinguishing between the two separate claims. Plaintiffs are warned that if they do not do a better job at defending their

Kansas' school financing law targets a suspect class, but instead that their right to a "minimally adequate education" is a fundamental right. If plaintiffs are correct, the court must apply a heightened scrutiny of the state act. On the other hand, if plaintiffs have failed to allege the deprivation of a fundamental right, the court need only decide whether Kansas' act bears a rational relationship to a legitimate state purpose.

Plaintiffs have alleged that the Kansas school financing act has caused the state "to fail to provide a suitable education for all public school students" (Doc. 1 ¶ 67). Thus, plaintiffs argue, the state has failed to provide them with a "minimally adequate education," a fundamental right under the United States Constitution (Doc. 1 ¶ 58). Although the Supreme Court has left open the question of whether the right to a minimally adequate education is a fundamental right, warranting a heightened level of scrutiny, the court finds plaintiffs have failed to sufficiently allege the deprivation of such a right.

In *Papasan v. Allain,* 478 U.S. 265 (1986), the Supreme Court stated it had "not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review." *Id.* at 285. The Court, however, found that the case did not require it to settle the question. The plaintiffs, in their complaint, simply and conclusively alleged they had been denied a minimally adequate education without supporting such an allegation with any facts. Although the case was before the Court on the defendants' motion to dismiss under Rule 12(b)(6), the Court stated it could disregard the plaintiffs' allegation and

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Due Process claim in a more specific manner, the court will consider the claim abandoned and will dismiss it accordingly.

simply apply the rational relationship standard. Specifically, the Court stated:

> Although for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation .... The petitioners' allegation that, by reason of the funding disparities relating to the Sixteenth Section lands, they have been deprived of a minimally adequate education is just such an allegation. The petitioners do not allege that schoolchildren in the Chickasaw Counties are not taught to read or write; they do not allege that they receive no instruction on even the educational basics; they allege no actual facts in support of their assertion that they have been deprived of a minimally adequate education. As we see it, we are not bound to credit and may disregard the allegation that the petitioners have been denied a minimally adequate education.

Id. at 286 (citations omitted).

In this case, plaintiffs make the bare allegation that "[a] minimally adequate education is a fundamental right under the United States and Kansas Constitutions." (Doc. 1 ¶ 58). In their response to defendants' motion, plaintiffs point out that under the Complaint's Count VI, the now voluntarily dismissed claim under the Kansas Constitution, they allege the State of Kansas has failed to provide them suitable funding, which they argue is the equivalent of the denial of a minimally adequate education (Doc. 31 at 16). Even so, plaintiffs still have failed to allege the facts necessary, under *Papasan,* in order to receive a heightened standard of review under their Equal Protection claim. Thus, like the Court in *Papasan,* this court will apply the "rationally related" standard. "The differential treatment alleged here constitutes an equal protection violation only if it is not rationally related to a legitimate state interest." *Id.* at 286.

That being so, defendants argue plaintiffs' equal protection claim should be dismissed because, as a matter of law, the State has a legitimate purpose in its established school funding policy. Furthermore, defendants argue, federal courts should pay deference to a state's decisions on its own educational policy. Defendants assert that the Supreme Court's decision in *San Antonio Ind. Sch. Dist. v. Rodriguez,* 411 U.S. 1 (1973) is controlling and the court must dismiss plaintiffs' claim.

In *Rodriguez,* the parents of Mexican-American children in an urban San Antonio school district challenged Texas's system of financing its public schools. Under that system, schools were funded from mainly two sources. Half of the funds came from a state program. *See id.* at 9. The rest of the funds came from a local property tax. *See id.* at 9 n.21. The plaintiffs claimed the system, because of varying wealths of the areas in which the school districts were located, created "substantial interdistrict disparities" throughout the state. *See id.* at 15.

Applying the rational relationship standard to the parents' equal protection challenge, *see id.* at 44, the Court determined Texas' system constitutional. *See id.* at 55. In doing so, the Court stated:

> It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivision in which citizens live.

Id. at 54.

Thirteen years later, however, the Court made clear that its holding in *Rodriguez* was not meant to declare constitutional, as a matter of law, all funding variations that might result from a State's public school funding policy. *See Papasan v. Allain,* 478 U.S. 265, 287 (1986). Rather, Justice White, writing for a majority of the court, clarified that *Rodriguez* "held merely that the variations that resulted

from allowing local control over local property tax funding of the public schools were constitutionally permissible in that case." *Id.* (footnote omitted). *Papasan* involved claims by the school children and school officials of 23 Mississippi counties that the state's unequal distribution of funds from "Sixteenth Section or Lieu Lands" created a disparity between the plaintiffs' and other schools. *See id.* at 265-75. The Court of Appeals for the Fifth Circuit affirmed the district court's dismissal of the plaintiffs' Equal Protection claim, reasoning that *Rodriguez* controlled the decision. *See id.* at 275. The Supreme Court, however, disagreed and reversed:

> To begin with, we disagree with the Court of Appeals' apparent understanding of the crux of the petitioners' claim. As we read their complaint, the petitioners do not challenge the overall organization of the Mississippi public school financing program. Instead, their challenge is restricted to one aspect of that program: The Sixteenth Section and Lieu Lands funding. All of the allegations in the complaint center around disparities in the distribution of these particular benefits, and no allegations concerning disparities in other public school funding programs are included.
>
> Consequently, this is a very different claim than the claim made in *Rodriguez.* In *Rodriguez,* the contention was that the State's overall system of funding was unconstitutionally discriminatory. There, the Court examined the basic structure of that system and concluded that it was rationally related to a legitimate state purpose. In reaching that conclusion, the Court necessarily found that funding disparities resulting from differences in local taxes were acceptable because related to the state of allowing a measure of effective local control over school funding levels. *Rodriguez* did not, however, purport to validate all funding variations that might result from a State's public school funding

decision. It held merely that the variations that resulted from allowing local control over local property tax funding of the public schools were constitutionally permissible in that case.

Here, the petitioners' claim goes neither to the overall funding system nor to the local ad valorem component of that system. Instead, it goes solely to the Sixteenth Section and Lieu Lands portion of the State's public school funding. And, as to this claim, we are unpersuaded that *Rodriguez* resolves the equal protection question in favor of the State. The allegations of the complaint are that the State is distributing the income from Sixteenth Section lands or from lieu lands or funds unequally among the school districts, to the detriment of the Chickasaw Cession schools and the students . . . . This case is therefore very different from *Rodriguez,* where the differential financing available to school districts was traceable to school district funds available from local real estate taxation, not to a state decision to divide state resources unequally among school districts. The rationality of the disparity in *Rodriguez,* therefore, which rested on the fact that funding disparities based on differing local wealth were a necessary adjunct of allowing meaningful local control over school funding, does not settle the constitutionality of disparities alleged in this case, and we differ with the Court of Appeals in this respect.

Id. at 286-88 (footnotes omitted).

Rodriguez and *Papasan,* read together, dictate that dismissal of an equal protection claim is appropriate to a challenge of a state's allowing funding disparities attributable to variations of wealth and resulting taxes of the different school districts. *Papasan,* however, makes clear that when the state's actions go a step further, that is, when the state actually disburses funds to the school districts, in unequal amounts, dismissal under Rule 12(b)(6) is not

appropriate. Although the court must still apply the "rational relationship" standard to the claim, a standard tough for a plaintiff to meet, the court cannot find as a matter of law that it can never be met.

Plaintiffs' complaint attacks two specific provisions of the Kansas school funding act. Plaintiffs first attack the Kansas Act's adjustment of the base rate of funding, referred to as "low enrollment weighting," whereby the state disburses additional funds to school districts with fewer than 1725 students (Doc. 1 ¶ 27). Plaintiffs also attack the Act's provision allowing the individual school districts to pass "local option budgets" to supplement funding received from the State (Doc. 1 ¶ 33). According to the complaint, this type of supplemental funding "requires the levying of additional taxes and is sometimes dependant on the approval of residents of the district." (Doc. 1 ¶ 33). It is plaintiffs' contention that school districts in areas of comparatively high median incomes and property values raise more funds through the local option budget than those comparatively low median incomes and property values (Doc. 1 ¶¶ 24-26).

Because the two provision of the Kansas Act are different, the two provisions receive different treatment for purposes of defendants' motion to dismiss. Plaintiffs' attack on the low enrollment weighting is governed by *Papasan,* while their attack on the local option budgets is governed by *Rodriguez.* The low enrollment weighting is a disbursement of funds from the State to the different school districts. The allegation that the State is disbursing these funds in unequal amounts to the different school districts is analogous to Mississippi's unequal distribution of funds from the Sixteenth Section of Lieu Lands in *Papasan.* Thus, dismissal of plaintiffs' equal protection challenge to Kansas' provision of low enrollment weighting is not appropriate.

The local option budget, however, is analogous to the challenged scheme discussed in *Rodriguez.* According to

plaintiffs' complaint, the alleged disparities created by the local option budgets is attributed to the varying wealths of the areas. Dismissal is therefore warranted because it is not the "constitutional prerogative" of the federal courts "to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivision in which citizens live." *Rodriguez,* 411 U.S. at 54. Therefore, plaintiffs' equal protection and due process claims are not dismissed. However, their claims are limited to a challenge of Kansas' provision for low enrollment weighting.

THE TENTH AMENDMENT

Defendants' last argument is that the Tenth Amendment of the United States Constitution bars the relief sought by plaintiff. Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Supreme Court interprets the amendment to mean if an authority to act has been delegated by the Constitution to Congress, then Congress may act pursuant to Article I; if not, the power is reserved to the states. *See New York v. United States,* 505 U.S. 144 (1992); *Kansas v. United States,* 214 F.3d 1196, 1198 (10th Cir. 2000).

With this simple statement concerning Tenth Amendment jurisprudence, the court is confused by defendants' argument. Although defendants cite to two recent Supreme Court decisions in which a state challenged a federal statute, (Doc. 15 at 30-31) (citing *New York v. United States,* 505 U.S. 144 (1992) (Low-Level Radioactive Waste Policy Act) and *Printz v. United States,* 521 U.S. 898 (1997) (Brady Act)), defendants' argument is that "[a]n Order by a federal ***judge*** to a legislature of a sovereign state to revise a law is 'fundamentally incompatible with our constitutional system of dual sovereignty.'" (Doc. 15 at 32) (emphasis added). If

it is indeed defendants' position that this federal court is without constitutional authority to order state officials to comply with federal law, the court firmly disagrees.

In *Puerto Rico v. Branstad,* 483 U.S. 219 (1987), the Supreme Court stated:

> [i]t has long been a settled principle that federal courts may enjoin unconstitutional action by state officials. See *Ex parte Young,* 209 U.S. 123, 155-56 (1908). It would be superfluous to restate all the occasions on which this Court has imposed upon state officials a duty to obey the requirements of the Constitution, or compelled the performance of such duties; it may suffice to refer to *Brown v. Board of Education,* 349 U.S. 294 (1955), and *Cooper v. Aaron,* 358 U.S. 1 (1958).

Id. at 228. Even in one of the cases cited by defendants, the Supreme Court again stated what it must have believed to be axiomatic:

> the text of the Constitution plainly confers this authority on the federal courts, the "judicial Power" of which "shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . .; [and] to Controversies between two or more States; [and] between a State and Citizens of another State." U.S. Const., Art. III, § 2. The Constitution contains no analogous grant of authority to Congress. Moreover, the Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply.

New York v. United States, 505 U.S. 144, 179 (1992). Defendants' argument fails.

If the court were to read defendants' brief with an exceptionally liberal eye, it could possibly read a Tenth Amendment challenge to Congress's enactment of Title VI and the Rehabilitation Act. Defendants only fleetingly

mention such an idea in the middle of their Eleventh Amendment argument. *See* Doc. 15 at 10 ("Congress has also been prohibited from commandeering state officials to manage and administrate expansive federal regulatory schemes." (citing *Printz*)); Doc. 15 at 15 ("The similarities between the Brady Act in *Printz* and the Rehabilitation Act are striking"). If defendants were indeed attempting to make such an argument, it fails nevertheless because, as explained above, both Title VI and the Rehabilitation Act were enacted pursuant to Congress's authority under the Spending Clause. *See Kansas v. United States,* 214 F.3d 1196, 1202 (10th Cir. 2000) (stating *Printz* not persuasive to state's challenge to federal act enacted pursuant to Spending Clause). As the Tenth Circuit explained in *Kansas v. United States,* the Tenth Amendment and the Spending Clause "are essentially mirror images of each other: if the authority to act has been delegated by the Constitution to Congress, then it may act pursuant to Article I; if not, the power has been reserved to the states by the Tenth Amendment." *Id.* at 1198 (citing *New York v. United States,* 505 U.S. 144, 156 (1992)).

CONCLUSION

In conclusion, defendants have failed to come forward with any argument warranting dismissal of any of plaintiffs' claims with the specific exception that plaintiffs' Fourteenth Amendment challenge is limited to a challenge of low enrollment weighting. The litigation may proceed. Plaintiffs must file a motion to amend their complaint in accordance with this opinion no later than 10 days from the filing of this opinion.

A motion for reconsideration of this order pursuant to this court's Rule 7.3 is not encouraged. A motion to reconsider is appropriate where the court has obviously misapprehended a party's position or the facts or applicable law, or where the party produces new evidence that could not have been obtained through the exercise of reasonable

diligence. Revisiting the issues already addressed is not the purpose of a motion to reconsider and advancing new arguments or supporting facts which were otherwise available for presentation when the original motion was briefed or argued is inappropriate. *Comeau v. Rupp,* 810 F. Supp. 1172 (D.Kan. 1992). Any motion for reconsideration shall be limited to five double-spaced pages. A response shall be similarly limited. No reply may be filed.

IT IS THEREFORE ORDERED BY THE COURT that defendants' motions to dismiss (Docs. 12 and 14) are DENIED. IT IS SO ORDERED.

CONSTITUTION OF THE UNITED STATES

ARTICLE I-THE CONGRESS

Section 8.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;-And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors of President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or

rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

29 U.S.C. § 794

UNITED STATES CODE TITLE 29. LABOR

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined. For the purposes of this section, the term "program or activity" means all of the operations of-

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers. Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section. The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

UNITED STATES CODE TITLE 42.
THE PUBLIC HEALTH AND WELFARE

§ 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 2000d-1.

Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to Congressional committees; effective date of administrative action

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by

the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity

§ 2000d-7. Civil rights remedies equalization

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

(b) Effective date

The provisions of subsection (a) of this section shall take effect with respect to violations that occur in whole or in part after October 21, 1986.

CODE OF FEDERAL REGULATIONS

TITLE 34—EDUCATION

SUBTITLE B-REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION

CHAPTER I-OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION

PART 100-NONDISCRIMINATION UNDER PROGRAMS RECEIVING FEDERAL ASSISTANCE THROUGH THE DEPARTMENT OF EDUCATION EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

§ 100.3 Discrimination prohibited.

(a) General. No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

(b) Specific discriminatory actions prohibited.

(1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

(3) In determining the site or location of a facilities, an applicant or recipient may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose or effect

of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

(4) As used in this section, the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(c) Employment practices.

(1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the employment of such individuals or to

help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of such individuals, or (iv) to provide remunerative activity to such individuals who because of handicaps cannot be readily absorbed in the competitive labor market. The following, under existing laws, have one of the above objectives as a primary objective:

(A) Projects under the Public Works Acceleration Act, Pub.L. 87-658, 42 U.S.C. 2641-2643.

(B) Work-study under the Vocational Education Act of 1963, as amended, 20 U.S.C. 1371-1374.

(C) Programs assisted under laws listed in Appendix A as respects employment opportunities provided thereunder, or in facilities provided thereunder, which are limited, or for which preference is given, to students, fellows, or other persons in training for the same or related employments.

(D) Assistance to rehabilitation facilities under the Vocational Rehabilitation Act, 29 U.S.C. 32-34, 41a and 41b.

(2) The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall

apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

(d) Indian Health and Cuban Refugee Services. An individual shall not be deemed subjected to discrimination by reason of his exclusion from benefits limited by Federal law to individuals of a particular race, color, or national origin different from his.

(e) Medical emergencies. Notwithstanding the foregoing provisions of this section, a recipient of Federal financial assistance shall not be deemed to have failed to comply with paragraph (a) of this section if immediate provision of a service or other benefit to an individual is necessary to prevent his death or serious impairment of his health, and such service or other benefit cannot be provided except by or through a medical institution which refuses or fails to comply with paragraph (a) of this section.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CHEROKEE, LAJUAN and MYTESHA ROBINSON, by and through their mother and next friend, Earnestine Robinson ERIC and RYAN MONTOY, by and through their father and next friend, Reuben Montoy; SIERRA and SETH GWIN, by and through their mother and next friend, Kimberly Gwin; RENE BESS, by and through his grandfather and next friend, Earl Bess, Jr.; KEELY BOYCE by and through her mother and next friend, Kenna Boyce; CRUIZ CEDILLO, by and through his mother and next friend, Sandra Delgado; LYNETTE DO, by and through her mother and next friend, Lieu Do; EZEKIAL and EMERALD GARCIA, by and through their mother and next friend, Evangelina Garcia; CHRISTOPHER and MONIQUE HARDING, by and through their mother and next friend, Phyllis Harding; JOSEPH HAWKINSON, by and through his mother and next friend, Melody Hawkinson; LAURI MAYNES, by and through her father and next friend, Robert Maynes; JENNIE NGUYEN, by and through her father and next friend, Phillip Nguyen; SHASTA OAKS, by and through her mother and next friend, Mary Lu Tripplitt; SANDY, NICOLE and BRUCE THU PHAM, by and through their father and next friend, Da Thu Pham; ANDREA BETHKE, by and through her mother and next friend, Linda Bethke; UNIFIED SCHOOL DISTRICT NO. 443; and UNIFIED	)	Case No. 99-1193 JTM

SCHOOL DISTRICT NO. 305,)
Plaintiffs,)
v.)
THE STATE OF KANSAS; BILL GRAVES, in his official capacity as the governor of the State of Kansas; LINDA HOLLOWAY, in her official capacity as the chairperson of the State Board of Education; and ANDY TOMPKINS, in his official capacity as commissioner of the State Department of Education,)
Defendants.)

COMPLAINT

COME NOW the plaintiffs in the above-captioned matter, and for their Complaint against the above-named defendants, allege and state as follows:

Parties

1. Plaintiffs Cherokee, LaJuan and Mytesha Robinson are African-American students attending public school in Unified School District No. 443. Cherokee, LaJuan and Mytesha Robinson are residents and citizens of the state of Kansas and the United States of America.

2. Plaintiffs Eric and Ryan Montoy are Hispanic students attending public school in Unified School District No. 305. Eric and Ryan Montoy are citizens and residents of the state of Kansas and the United States.

3. Plaintiffs Sierra and Seth Gwin are disabled students as defined by the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* Sierra and Seth Gwin attend public school in Unified School District No. 305 and are citizens and residents of the state of Kansas and the U.S.

4. Plaintiff Rene Bess is an African-American student attending public school in Unified School District No. 305.

Rene Bess is a citizen and resident of the state of Kansas and the U.S.

5. Plaintiff Keely Boyce is a disabled student attending public school in Unified School District No. 305. Keely Boyce is a citizen and resident of the state of Kansas and the U.S.

6. Plaintiff Cruiz Cedillo is an Hispanic student attending public school in Unified School District No. 443. Cruiz Cedillo is a citizen and resident of the state of Kansas and the United States of America.

7. Plaintiff Lynette Do is an Asian-American student attending public school in Unified School District No. 443. Lynette Do is a citizen and resident of the state of Kansas and the U.S.

8. Plaintiffs Ezekial and Emerald Garcia are students attending public school in Unified School District No. 443. Ezekial and Emerald Garcia are citizens and residents of the state of Kansas and the United States.

9. Plaintiffs Christopher and Monique Harding are African-American students attending public school in Unified School District No. 443. Christopher and Monique Harding are residents and citizens of the state of Kansas and the United States.

10. Plaintiff Joseph Hawkinson is a disabled student attending public school in Unified School District No. 305. Joseph Hawkinson is a resident and citizen of the state of Kansas and the United States.

11. Plaintiff Lauri Maynes is an Hispanic student attending public school in Unified School District No. 305. Laud Maynes is a citizen and resident of the state of Kansas and the United States.

12. Plaintiff Jennie Nguyen is an Asian-American student attending public school in Unified School District No. 443. Jennie Nguyen is a citizen and resident of the state of Kansas and the United States.

13. Plaintiff Shasta Oaks is an African-American student attending public school in Unified School District No. 305. Shasta Oaks is a citizen and resident of the state of Kansas and the United States.

14. Plaintiffs Sandy, Nicole and Bruce Thu Pham are Vietnamese students attending public school in Unified School District No. 305. Sandy, Nicole and Bruce Thu Pham are legal residents of the state of Kansas and the United States.

15. Plaintiff Andrea Bethke is a disabled student as defined by the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* Andrea Bethke attends public school in Unified School District No. 443 and is a citizen and resident of the state of Kansas and the United States.

16. Plaintiff Unified School District No. 443 is a school district formed pursuant to state law and is located in Dodge City, Kansas.

17. Plaintiff Unified School District No. 305 is a school district formed pursuant to state law and is located in Salina, Kansas.

18. Defendant State of Kansas is a state governmental entity and may be served with process by serving the Kansas Attorney General, Carla Stovall, at the Kansas Judicial Center, 2nd Floor, 301 W. 10th Street, Topeka, Kansas 66612-1597.

19. Defendant Bill Graves is the governor of the State of Kansas and may be served with process at his official office at the State Capitol, 2nd Floor, Topeka, Kansas 66612-1590.

20. Defendant Linda Holloway is the chairperson of the Kansas State Board of Education. Defendant Holloway may be served with process at 120 S.E. 10th Street, Topeka, Kansas 66612.

21. Defendant Andy Tompkins is the commissioner of the Kansas State Department of Education. Defendant

Tompkins may be served with process at 120 S.E. 10th Street, Topeka, Kansas 66612.

Jurisdiction and Venue

22. This court possesses original jurisdiction over plaintiffs' claims arising under the U.S. Constitution and federal law, pursuant to 28 U.S.C. § 1331. This court has supplemental jurisdiction over plaintiffs' state law claims, pursuant to 28 U.S.C. § 1367(a).

23. Venue in this court is proper, pursuant to 28 U.S.C. § 139 1(b).

Facts

24. The State of Kansas funds its public schools, grades K-12, through the School District Finance and Quality Performance Act (SDFQPA), K.S.A. 72-6405 *et seq.* Pursuant to this Act, all public school districts in the state are allotted funds to operate their educational programs according to the statutory funding formula.

25. The State of Kansas receives monies from education programs administered by the federal government of the United States. The State uses these monies to fund public school districts, Such monies are distributed, along with State funds, pursuant to the SDFQPA funding formula.

26. Under the SDFQPA funding formula, each public school district receives a set amount of money per student enrolled in the district. This base rate effective July 1, 1999 is $3770 per student.

27. The base rate is adjusted by several factors, the most significant of which is low enrollment weighting. Public school districts with fewer than 1725 students receive additional funds per student pursuant to low enrollment weighting. In many cases, public school districts qualifying for low enrollment weighting receive more than twice as many dollars per student as those districts that do not qualify for such weighting.

28. Hispanic, African-American and Asian-American students are disproportionately enrolled in mid-size and large school districts which do not qualify for low enrollment weighting and which receive comparatively little funding per pupil from the State of Kansas under the current school finance law. As a group throughout the state, Hispanic, African-American and Asian-American students receive less funding per pupil from the State than do white students. This disparity adversely affects the educational opportunities and outcomes for Hispanic, African-American and Asian-American students in comparison with white students.

29. Likewise, students of non-U.S. origin are disproportionately enrolled in mid-size and large school districts which do not qualify for low enrollment weighting and which receive comparatively little funding per pupil from the State of Kansas under the current school finance law. As a group throughout the state, they receive less funding per pupil than do students of U.S. origin, and this disparity in spending adversely affects their educational opportunities and outcomes in comparison with students of U.S. origin.

30. Disabled students also are disproportionately enrolled in mid-size and large school districts which do not qualify for low enrollment weighting and which receive comparatively little funding per pupil from the State. As a result of this funding disparity, disabled students as a group throughout the state receive fewer educational opportunities and suffer more unfavorable outcomes than do non-disabled students.

31. Unified School District Nos. 443 and 305 enroll too many students to qualify for low enrollment weighting. These districts also enroll disproportionately more African-American, Asian-American, Hispanic, non-U.S. origin and disabled students than do school districts which qualify for

low enrollment weighting and which receive more funding per student.

32. A direct correlation exists between the State's inequitable school funding formula and unsatisfactory education outcomes experienced by Hispanic, African-American and Asian-American students throughout the state in comparison to the outcomes experienced by white students. The same correlation exists between the State's school funding formula and unsatisfactory outcomes experienced by disabled students in comparison to the outcomes experienced by non-disabled students. Likewise, a correlation exists between the State's funding formula and unsatisfactory outcomes experienced by students of non-U.S. origin in comparison to outcomes experienced by students who are of U.S. origin.

33. The SDFQPA permits individual school districts to pass local option budgets (LOBs) which supplement State funding. An LOB requires the levying of additional taxes and is sometimes dependant on the approval of residents of the district. A direct correlation exists between the median income and property values in a school district and that district's ability to raise funds through an LOB. School districts with comparatively high median incomes and property values raise more funds through LOBs than those with comparatively low incomes and property values.

34. African-American, Hispanic and Asian students are disproportionately enrolled in school districts with comparatively low incomes and property values. These districts collect fewer funds through LOBs than districts which are enroll disproportionate numbers of white students. This disparity results in fewer educational opportunities and less satisfactory outcomes for minority students than for white students.

35. Similarly, students of non-U.S. descent are disproportionately enrolled in school districts which have low or non-existent LOBs. This disparity results in fewer

educational opportunities and less satisfactory outcomes for non-U.S. origin students than for students who were born in the United States.

36. Likewise, disabled students are disproportionately enrolled in school districts with low or non-existent LOBs. This disparity results in fewer educational opportunities and less satisfactory outcomes for disabled students than for non-disabled students.

37. School districts with low median incomes and property values and corresponding low LOBs have fewer dollars per pupil to spend than do those districts with high LOBs. A direct correlation exists between the fewer amount of dollars collected through LOBs in these districts and unsatisfactory education outcomes experienced by minority students, students of non-U.S. origin and disabled students.

Count I: Title VI Disparate Impact – Race

38. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-37 above as though fully set out herein.

39. Defendants' current school funding law violates the rights of plaintiffs Cherokee, LaJuan and Mytesha Robinson Eric and Ryan Montoy, Rene Bess, Cruiz Cedillo, Lynette Do, Ezekial and Emerald Garcia, Christopher and Monique Harding, Lauri Maynes, Jennie Nguyen, Shasta Oaks and Sandy, Nicole and Bruce Thu Pham not to be discriminated against on the basis of race, The SDFQPA has a disparate negative impact on students who are African-American, Hispanic and Asian, in violation of the implementing regulations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*

40. The SDFQPA, although facially neutral, has a racially disproportionate adverse effect on African-American, Hispanic and Asian students. The SDFQPA perpetuates a dual system of education in Kansas, primarily, though not

entirely, through the devices of low enrollment weighting and LOBs, African-American, Hispanic and Asian students are disproportionately enrolled in school districts which have low LOBs and which receive fewer funds per pupil from the State. These students find themselves trapped in a system of which has less money to spend on them and thus adversely affects the quality of education available to them. Such students, in comparison to white students in the state, have disproportionately high dropout rates, are disproportionately the victims of violent acts at school, and their pass rates and standardized test scores are disproportionately low. They also have inferior access to education programs which would improve the quality of their education and which are disproportionately more available to white students.

41. Defendants do not have a substantial legitimate justification for the SDFQPA as it currently reads. Among other provisions of the SDFQPA, no legitimate justification exists for low enrollment weighting or the LOB as they are currently defined in that Act.

42. Equally effective alternative provisions are available which would eliminate the disparate negative impact currently suffered by African-American, Hispanic and Asian students, Such alternatives include, but are not limited to: eliminating low enrollment weighting where not supported by economies of scale or low population densities and more equitably distributing State funds to school districts which do not qualify for such weighting; eliminating the LOB and replacing it with uniform adequate statewide funding; and consolidation of low enrollment school districts (or funding such districts as though they were not low enrollment) where population density makes the same logistically possible.

43. As a result of defendants' violation of Title VI, the plaintiffs named in paragraph 39 above have suffered and continue to suffer injury.

Count II: Title VI Disparate Impact – National Origin

44. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-43 above as though fully set out herein.

45. Defendants' current school funding law violates the rights of plaintiffs Sandy, Nicole and Bruce Thu Pham not to be discriminated against on the basis of national origin. The SDFQPA has a disparate adverse impact on students who are of non-U.S. origin, in violation of the implementing regulations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*

46. The SDFQPA, although facially neutral, has a disproportionate adverse impact on students of non-US. national origin. The SDFQPA perpetuates a dual system of education in Kansas, primarily, though not entirely, through the devices of low enrollment weighting and LOBs. Students of non-US. origin are disproportionately enrolled in school districts which have low LOBs and which receive fewer dollars per pupil from the State. These students are trapped in a system which has less money to spend on them and thus adversely affects the quality of education available to them. Compared to students of U.S. origin, such students have disproportionately high dropout rates, they are disproportionately the victims of violent crimes at school and their pass rates and standardized test scores are disproportionately low. They also have inferior access to education programs which would improve the quality of their education and which are disproportionately available to students of U.S. origin.

47. Defendants lack any substantial legitimate justification for the two-tier system of education created by the SDFQPA, including, but not limited to, the Act's low enrollment weighting and LOB provisions.

48. Equally effective alternative provisions are available which would eliminate the disparate adverse impact currently suffered by students of non-U.S. national origin.

Such alternatives include, but are not limited to: eliminating low enrollment weighting where not supported by economies of scale or low population densities and more equitably distributing State funds to school districts that do not qualify for such weighting; eliminating the LOB and replacing it with uniform adequate statewide funding; and consolidation of low enrollment school districts (or funding such districts as though they were not low enrollment) where population density makes the same logistically possible.

49. As a result of defendants' violation of Title VI, the plaintiffs named in paragraph 45 above have suffered and continue to suffer injury.

Count III: Rehabilitation Act Disparate Impact

50. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-49 above as though fully set out herein.

51. Defendants' current school funding law violates the rights of plaintiffs Sierra and Seth Gwin, Keely Boyce, Joseph Hawkinson and Andrea Bethke not to be discriminated against on the basis of disability. The SDFQPA has a disparate negative impact on students who are disabled, in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*

52. The SDFQPA, although facially neutral, has a disproportionate adverse impact on disabled students. Disabled students are disproportionately enrolled in school districts which have low LOBs and which receive fewer funds per pupil from the State. Because of funding inequities created by the SDFQPA, disabled students have inferior access to education programs, facilities and transportation, all of which would improve the quality of their education and which are disproportionately available to non-disabled students.

53. Defendants do not have a substantial Legitimate justification for the SDFQPA as it currently reads, including those provisions of the Act relating to low enrollment weighting and the LOB.

54. Equally effective alternative provisions are available which would eliminate the disparate adverse impact currently suffered by disabled students. Such alternatives include, but are not limited to: eliminating low enrolment weighting where not supported by economies of scale or low population densities and more equitably distributing State funds to school districts who do not qualify for such weighting; eliminating the LOB and replacing it with uniform adequate statewide funding; and consolidation of low enrollment school districts (or funding such districts as though they were not low enrollment) where population density makes the same logistically possible.

55. As a result of defendants' violation of the Rehabilitation Act, the plaintiffs named in paragraph 51 above have suffered and continue to suffer injury.

Count IV: Equal Protection

56. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-55 above as though fully set out herein.

57. Kansas' current school finance law violates the rights of all plaintiffs in this action to equal protection of the laws, guaranteed by the United States and Kansas Constitutions. The SDFQPA treats similarly situated students differently, depending on the number of students enrolled in their school districts and the relative wealth of those school districts. Plaintiffs have been adversely affected as a result of defendants' unequal application of the law.

58. A minimally adequate education is a fundamental right under the United States and Kansas Constitutions. Defendants cannot demonstrate that low enrollment weighting or the LOB are necessary to serve a compelling

state interest. Nor can defendants demonstrate that the these provisions, as they now read, substantially further a legitimate legislative purpose.

59. Defendants lack a rational basis for low enrollment weighting and the LOB. The low enrollment weighting threshold, currently set at 1725 students, as demonstrated in practice over the past four years, is so wide of the mark as to be unreasonable. No rational basis exists for setting the threshold at 1725 students per school district. Through the LOB, the State has abdicated its constitutional duty to provide suitable funding for public schools.

60. Defendants are, under color of state law, depriving plaintiffs of their right to equal protection, in violation of the Fourteenth Amendment to the U.S. Constitution and § 1 of the Kansas Constitution Bill of Rights. As a result of the unlawful acts of defendants, plaintiffs have suffered and continue to suffer injury.

Count V: Due Process

61. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-60 above as though fully set out herein.

62. Defendants, under color of state law, have deprived and continue to deprive all plaintiffs to this action of the substantive due process rights guaranteed them by the U.S. and Kansas Constitutions.

63. Defendants established Kansas' school finance formula, including, but not limited to, its low enrollment weighting and LOB provisions, in an arbitrary and capricious manner. No rational justification exists for the school finance formula set forth in the SDFQPA as it now reads.

64. As a result of defendants' unlawful acts, plaintiffs have suffered and continue to suffer injury.

Count VI: Suitability of Funding Under the Kansas Constitution

65. Plaintiffs incorporate the allegations contained in paragraphs 1-64 above as though fully set out herein.

66. As demonstrated in practice over the past four years, the SDFQPA, including its low enrollment weighting and LOB provisions, fails to make suitable provision for financing the education of public school students, in violation of the Kansas Constitution, Article 6, § 6. In practice, the SDFQPA has led to underfunding of plaintiffs' school districts and an inequitable distribution of finances.

67. These inadequacies of the SDFQPA, demonstrated by data reflecting how it has operated in practice over the past four years, have caused the State to fail to provide a suitable education for all public school students, these plaintiffs included. In particular, the LOB provision is a complete abdication by the State of its constitutional obligation to provide for a suitable statewide system of school finance.

68. The plaintiffs named in this lawsuit, as well as all students enrolled in Unified School District Nos. 443 and 305, have suffered and continue to suffer injury as a result of defendants' violation of the Kansas Constitution, Article 6, § 6.

Relief Requested

WHEREFORE, plaintiffs respectfully request the following relief:

a. prospective injunctive relief against these defendants requiring them to revise Kansas' school finance law to comply with all applicable state and federal law;

b. their reasonable attorney fees incurred in litigating this action;

c. the costs of this action; and

d. such other and further relief as the court deems just and equitable.

Respectfully submitted,

/s/

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS DIVISION SIX

ERIC and RYAN MONTOY, et al., Plaintiffs,
v.
STATE OF KANSAS, et al., Defendants.

Case No. 99-C-1738

MEMORANDUM DECISION AND ORDER

I. INTRODUCTION

The above captioned matter comes before the Court on Plaintiffs' challenge of the Kansas school finance formula, the State District Finance and Quality Performance Act ("SDFQPA"), K.S.A. §72-6405, *et. seq.* Plaintiffs contend that the SDFQPA is inadequate under state constitutional standards and that the distribution of state resources among school districts is unfair.

The Court ordered the parties to file briefs to determine various legal issues in advance of trial. On October 12, 2001, the Court received a Memorandum to Determine Legal Issues in Advance of Trial filed by Plaintiffs. On October 19, 2001, the Court received a Pretrial Memorandum filed by Defendants. On October 26, 2001, the Court received Plaintiffs' Reply to the Pretrial Memorandum of Defendants. In a letter dated November 15, 2001, Plaintiffs submitted supplemental authority in support of their contentions set forth in their Memorandum in Support of Legal Issues in Advance of Trial.

II. HISTORICAL ANALYSIS OF THE STATE DISTRICT FINANCE AND QUALITY PERFORMANCE ACT

In 1992, the Kansas Legislature repealed the School District Equalization Act (SDEA) and enacted the SDFQPA

The action by the legislature was a result of litigation filed in this Court. In that litigation, several school districts and individuals challenged the constitutionality of the SDEA. On October 14, 1991, this Court issued an opinion responding to 10 questions, which formed governing rules of law applicable to the challenges. *Mock v. State,* 91-CV-1009 (Shawnee County District Court, slip op. October 14, 1991). The decision of this Court prompted the Governor and legislative leaders to appoint a task force to determine alternatives, which would satisfy the guidelines of the decision. The task force issued a report recommending a new formula granting each district the same base state aid per pupil and then allowing for certain adjustments for student needs and district size. The legislature utilized this report when preparing the SDFQPA.

The SDFQPA was almost immediately challenged on the basis that it was unconstitutional. On December 2, 1994, the Kansas Supreme Court held that the SDFQPA was constitutional in all respects. *U.S.D. 229 v. State*, 256 Kan. 232 (1994). The Court concluded that the legislature had made suitable provisions for financing public education. *Id.*

III. ISSUES PRESENTED

Plaintiffs attack three components of the SDFQPA: the low enrollment weight; the new school facilities weight; and the local option budget. Defendants contend that the Supreme Court's 1994 decision is binding on this Court and thus the challenges to the SDFQPA should be rejected. In response to the argument that the 1994 decision is controlling, Plaintiffs state that much has changed in Kansas school finance since this Court's decision in *Mock v. State* and the Supreme Court's decision in *U.S.D. 229.* Therefore, the SDFQPA now provides an inadequate education to Kansas children.

Plaintiffs have raised several new issues that were not contained in their pleadings. Kansas law requires that a challenge to the constitutionality of a statute be specifically

raised in the pleadings. *Missionary Baptist Convention v. Wimberly Chapel Baptist Church,* 170 Kan. 684 (1951). Plaintiffs had the opportunity to amend their pleading to include these new issues prior to the Court ordered deadline of November 11, 2000. Plaintiffs failed to do so. The issues raised by Plaintiffs that the Court will not consider because they were not properly pled are: 1) Plaintiffs' constitutional challenge to K.S.A. § 72-880 1, *et seq.* (Capital Outlay); 2) Plaintiffs' constitutional challenge to K.S.A. § 72-961, *et seq.* (Special Education Excess Costs); and 3) Plaintiffs' claim that the SDFQPA violates Article 6, § 2(a) of the Kansas Constitution (as being an encroachment on the "general supervision" responsibility of the State Board of Education). Plaintiffs failed to properly raise these issues or amend their petition to include these issues. Therefore, this Court will not permit these claims to be raised at this point in the case.

IV. JUDICIAL SCRUTINY OF THE ACT

The SDFQPA has a presumption of constitutionality and must be allowed to stand unless it is shown to clearly violate a constitutional inhibition. *Id.* "[T]he judiciary's role is very limited in scope. The wisdom or desirability of the legislature is not before us. The constitutional challenge goes only to testing the legislature's power to enact legislation." *Id.* When analyzing challenges to school funding legislation, the Supreme Court has stated that:

> The funding of public education is a complex, constantly evolving process. The legislature would be derelict in its constitutional duty if it gave each school district a blank check each year. Rules have to be made and lines drawn in providing "suitable financing." The drawing of these lines lies at the very heart of the legislative process and the compromises inherent in the process.

Id. at 265.

In *U.S.D. 229,* the Supreme Court stated that the constitutionality of the Act was to be judged using the

rational basis standard. The Supreme Court specifically noted that the Act did not base legislative classifications on any suspect classes. *Id.* "[U]nder the rational basis standard, those attacking the rationality of the legislative classification have the burden to negative every conceivable bases which might support it." *Jackson v. U.S.D. 259,* 31 P.3d 989 (2001) (citing *Feden v. Kansas Department of Revenue,* 261 Kan. 239 (1996)).

Plaintiffs have recently raised the argument that the legislative classifications should be reviewed for equal protection purposes under the strict scrutiny standard. Plaintiffs did not claim a right to strict scrutiny review in their petition, nor did they raise it as a question of law in their pretrial questionnaire. In *U.S.D. 229,* the Kansas Supreme Court ruled, "[a] look at specific provisions of the Act reflects we are not dealing with any suspect classes." *U.S.D. 229* at 263. The law is clear that absent an allegation of discriminatory intent, an allegation of disparate impact fails to implicate the Equal Protection Clause. Plaintiffs contend the Act's application results in a "disparate impact," however; Plaintiffs fail to suggest the Act was enacted with a discriminatory intent or purpose. Therefore, the appropriate level of scrutiny is the rational basis test.

V. LOW ENROLLMENT WEIGHTING

"Plain common sense advises there is a rational basis for the allowance of extra funding for low enrollment situations." *U.S.D. 229 v. State,* 256 Kan. 232 (1994). In 1994, the Supreme Court held that low enrollment weighting for districts with enrollments of up to 1,899 students was not too high. Since 1994, the legislature has lowered the cutoff to 1,725 students, and added "correlation weighting" for districts above the 1,725 threshold. The question this Court must determine is whether the new cutoff is "so very wide of any reasonable mark" that it violates constitutional limitations.

The Supreme Court has stated that it is not necessary for the legislature to use statistical or scientific evidence to determine where cutoff should be in making decisions in the school finance arena. *Id.* The Supreme Court said that there must be "a rational relationship between the legislature's legitimate objective of more suitably funding public schools and the classifications created in the low enrollment factor." *Id.*

Plaintiffs fail to explain how the reduction in the cutoff from 1,899 to 1,725 is so significant that it has created a new legal issue for this Court to address. The Supreme Court has previously stated that the concept of low enrollment weighting is "plain common sense." *Id.* Courts "should not substitute judicial judgment for educational decisions and standards." *Id.* The actions taken by the legislature since 1994 are within the legislature's authority, and are therefore constitutional.

VI. LOCAL OPTION BUDGET

Since 1994, the legislature has authorized certain districts to access a Local Option Budget (LOB) without voter protest, eliminated a requirement that the LOB percentage drop as the base state aid per pupil (BSAPP) increases, and included additional special education funds into the LOB calculation. In 1994, the Supreme Court held there was a rational basis for the local option budget. The question before this Court is whether the recent changes have resulted in making the local option budget violate constitutional limitations.

As a matter of law, the equal protection clause is not implicated solely because the benefits and burdens of a statute fall unevenly depending upon the relative wealth of school districts. *San Antonio Independent School District v. Rodriquez,* 411 U.S. 1 (1973), *Papasan v. Allain,* 478 U.S. 265 (1986), *Robinson v. State,* 117 F. Supp. 2d 1124 (D. Kan. 2000). In 1994, the Kansas Supreme Court stated that there was a rational relationship between an LOB and a

legitimate legislative objective. *U.S.D. 229 v. State*, 256 Kan. 232 (1994). Plaintiffs have requested this Court to revisit the issue because more school districts are accessing the LOB than when the Supreme Court decided the issue. *Id.* Simply using the LOB provision of the Act does not remove its relationship to a legitimate legislative objective. The changes made since 1994 are not significant enough to change the constitutional status of the LOB provision, therefore the Supreme Court's decision in *U.S.D. 229* is binding on this Court.

VII. NEW FACILITIES WEIGHTING

In *U.S.D. 229,* the Supreme Court stated that a rational basis existed for the new facilities weighting provision. This provision permits districts to obtain additional funding for two years for new facilities if a district is already at the maximum LOB. No changes have been made to this provision since the decision in *U.S.D. 229.* The Supreme Court has considered this provision and determined it was constitutional, therefore, the *U.S.D. 229* holding is binding on this Court.

VIII. ARTICLE 6, § 6(b) ALLEGATIONS

Article 6, § 6(b) provides that "The legislature shall make suitable provision for finance of the educational interests of the state." In considering what the "suitable provision" language means, the Kansas Supreme Court has stated "that the issue for judicial determination was whether the Act provides suitable financing, not whether the level of finance is optimal or the best policy." *U.S.D. 229* at 254. The Court adopted the following language from Shawnee County District Court Judge Maria Luckert's *nisi prius* decision:

> In common terms, "suitable" means fitting, proper, appropriate, or satisfactory. Webster's New Collegiate Dictionary (1977). Suitability does not mandate excellence or high quality. In fact, suitability does not imply any objective, quantifiable education standard

> against which schools can be measured by a court. Rather, value judgments must be made regardless of whether the constitutional mandate requires that education be suitable, sufficient, appropriate, or adequate.

Id. at 257.

The Supreme Court in *U.S.D. 229* emphasized that court-made standards should not be imposed on state education officials as part of making a "suitability" determination during a court case. A "suitability" challenge under Article 6, § 6(b) must be judged against standards set by the legislature and the state board of education, not the courts. The question for this Court, thus, is whether the legislature, by its own standards and those of the State Board, has made suitable provisions for the financing of public education. While some might criticize this language as "handing over a legal constitutional determination to the legislature," it is nonetheless the holding of our State's highest court, by which this "inferior" court is bound until there altered.

It is undisputed that all of Plaintiffs' schools are fully accredited under statutory and regulatory requirements. While the legislature has modified the accreditation requirements since 1994, the situation remains that "[t]he evidence presented is that all schools in Kansas are able to meet such a standard." *Id.* Plaintiffs contend that Kansas has underfunded its school funding formula to such a degree that Plaintiff school children are deprived of a "constitutionally adequate education." Obviously, such is not the case, as all schools meet legislative criteria as a matter of law. Plaintiff school districts, therefore, are adequately funded to meet all requirements for operations of their schools.

IX. Conclusion

The Kansas Supreme Court stated that "past history teaches that [the constitutionality of school finance legislation] . . . must be closely monitored. Previous school finance legislation, when initially attacked upon enactment

or modification, was determined constitutional. Then, underfunding and inequitable distribution of finances lead to judicial determination that the legislation no longer complied with constitutional provisions." *U.S.D. 229* at 258. This Court agrees that school finance legislation must be closely monitored. In *Mock,* this Court thoroughly addressed a situation where underfunding and inequitable distribution had crept into the school finance formula. After careful review, this Court finds and concludes that the issues presented fail to suggest that the school finance formula is unconstitutional under currently prevailing rules established by the Kansas Supreme Court.

The foregoing memorandum decision and order shall serve as the Court's final entry of judgment, no further journal entry being required.

Dated this 21st day of November 2001.

/s/
Terry L. Bullock
District Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS DIVISION SIX

ERIC and RYAN MONTOY, et al., Plaintiffs,	)	
v.	)	Case No. 99-C-1738
STATE OF KANSAS, et al., Defendants.	)	

MEMORANDUM DECISION AND ORDER

The above captioned matter comes before the Court on Plaintiffs' Motion to Alter or Amend Judgment. Plaintiffs request an order, pursuant to K.S.A. § 60-252(b), altering or amending the Court's November 21, 2001 Memorandum Decision and Order. After careful consideration, the Court finds and concludes as follows:

Facts

1) The Court ordered the parties to file briefs to determine various legal issues in advance of trial.

2) On October 12, 2001, the Court received a Memorandum to Determine Legal Issues in Advance of Trial filed by Plaintiffs.

3) On October 19, 2001, the Court received a Pretrial Memorandum filed by Defendants.

4) On October 26, 2001, the Court received Plaintiffs' Reply to the Pretrial Memorandum of Defendants.

5) In a letter dated November 15, 2001, Plaintiffs submitted supplemental authority in support of their contentions set forth in their Memorandum in Support of Legal Issues in Advance of Trial.

6) On November 21, 2001, the Court filed a Memorandum Decision and Order stating that the issues presented in

this case failed to suggest that the school finance formula is unconstitutional under currently prevailing rules established by the Kansas Supreme Court.

Discussion

Plaintiffs first argue that the "procedural posture" of the case rendered dismissal and/or summary judgment inappropriate. Plaintiffs contend that they did not have a fair opportunity to address challenges to the legal sufficiency of their claims. The parties agreed at the pretrial conference to a briefing schedule to determine the legal issues raised by the Plaintiffs' lawsuit. In compliance with the agreed upon briefing schedule, Plaintiffs filed a Memorandum to Determine Legal Issues in Advance of Trial on October 12, 2001. Plaintiffs set forth the claims they intended to make, including a factual and legal basis for each. Defendants subsequently filed their pretrial memorandum, which was followed by a reply by the Plaintiffs. Plaintiffs later submitted supplemental authority in a letter providing further support for Plaintiffs' claims.

Plaintiffs now contend that they "had no occasion to present the court with evidence in the record to refute defendants' contentions." Plaintiffs knew prior to filing their Memorandum to Determine Legal Issues in Advance of Trial that Defendants were challenging the legal sufficiency of Plaintiffs' claims. The title of their brief alone suggests that Plaintiffs were fully aware that the memorandum they filed would be used to "determine legal issues in advance of trial." In addition, Plaintiffs submitted a reply to Defendants' memorandum and a letter setting forth support for their claims.

Plaintiffs further contend that the rules for summary judgment were not properly followed. The Court's Memorandum Decision and Order was not based on a motion for summary judgment. The parties submitted briefs to the Court to determine whether Plaintiffs' claims were

legally sufficient as a matter of law. Therefore, the rules set forth for summary judgment did not have to be followed.

There is no question Plaintiffs understood that they were submitting briefs for the Court to determine the legal sufficiency of their claims. Not only did the Court order them to file a brief, but they agreed that a briefing schedule should be established to determine these issues. Plaintiffs had ample opportunity to present and argue the legal sufficiency of their claims.

Finally, Plaintiffs contend that the Court's legal analysis was incorrect when it found Plaintiffs' claims failed to suggest that the school finance formula is unconstitutional under currently prevailing rules established by the Kansas Supreme Court. Upon reviewing the contentions set forth by Plaintiffs in their Motion to Alter or Amend, the Court finds that no new arguments or authorities have been presented.

Plaintiffs have failed to produce any further evidence concerning this case that would lead the Court to decide that it should amend its prior order. The arguments made by Plaintiffs were considered when the Court made its initial determination, and thus are not persuasive at this time. The Court already addressed Plaintiffs' contentions in its November 21, 2001 Memorandum Decision and Order. Therefore, the Court does not deem it necessary to set forth the exact same reasoning once again.

CONCLUSION

The Court has considered the arguments raised by Plaintiffs and reviewed the prior decision of this Court. Having done so, the Court finds that its previous decision was true and correct. This Memorandum Decision and Order shall serve as the Order of the Court, no further journal entry being required. Dated this 11th day of January 2002.

/s/
Terry L. Bullock
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

LAJUAN and MYTESHA ROBINSON, by and through their mother and next friend, Earnestine Robinson; RYAN MONTOY, by and through his father and next friend, Reuben Montoy; SIERRA and SETH GWIN, by and through their mother and next friend, Kimberly Gwin; RENE BESS, by and through his grandfather and next friend, Earl Bess, Jr.; KEELY BOYCE by and through her mother and next friend, Kenna Boyce; CRUZ CEDILLO, by and through his mother and next friend, Sandra Delgado;)LYNETTE DO, by and through her mother and next friend, Lieu Do; CHRISTOPHER and MONIQUE HARDING, by and through their mother and next friend, Phyllis Harding; JOSEPH HAWKINSON, by and through his mother and next friend, Melody Hawkinson; JENNIE NGUYEN, by and through her father and next friend, Phillip Nguyen; SANDY, NICOLE and BRUCE THU PRAM, by and through their father and next friend, Da Thu Pham; ANDREA BETHKE, by and through her mother and next friend, Linda Bethke,

Plaintiffs,

v.

THE STATE OF KANSAS; BILL GRAVES, governor of the State of Kansas, in his official capacity; I.B. "SONNY" RUNDELL, chairperson of the State Board of Education, in his official capacity; JANET WAUGH, member of the Kansas State Board of Education, in her official capacity; SUE GAMBLE, member of the Kansas State Board of Education, in her official capacity; JOHN W. BACON, member of the Kansas State Board of Education, in his official capacity; BILL WAGNON, member of the Kansas State Board of Education, in his official capacity; BRUCE WYATT, member of the Kansas State Board Education, in his official capacity; HAROLD L. VOTH, member of the Kansas State Board of Education, in his official capacity;

CAROL RUPE, member of the Kansas State Board of Education, in her official capacity; VALERIE DeFEVER, member of the Kansas State Board of Education, in her official capacity; STEVE E. ABRAMS, member of the Kansas State Board of Education, in his official capacity; ANDY TOMPKINS, commissioner of the State Department of Education, in his official capacity; and TIM SHALLENBURGER, Treasurer of the State of Kansas, in his official capacity,

Defendants.

Case No. 99-1193-MLB

FIRST AMENDED COMPLAINT

COME NOW the plaintiffs in the above-captioned matter, and for their First Amended Complaint against the above-named defendants, allege and state as follows:

Parties

1. Plaintiffs LaJuan and Mytesha Robinson are African-American students attending public school in Unified School District No. 443. LaJuan and Mytesha Robinson are residents and citizens of the state of Kansas and the United States.

2. Plaintiff Ryan Montoy is an Hispanic student attending public school in Unified School District No. 305. Ryan Montoy is a citizen and resident of the state of Kansas and the United States.

3. Plaintiffs Sierra and Seth Gwin are disabled students as defined by the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* and the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq.* Sierra and Seth Gwin attend public school in Unified School District No. 305 and are citizens and residents of the state of Kansas and the United States.

4. Plaintiff Rene Bess is an African-American student attending public school in Unified School District No. 305.

Rene Bess is a citizen and resident of the state of Kansas and the United States.

5. Plaintiff Keely Boyce is a disabled student as defined by the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* and the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq.* Keely Boyce attends public school in Unified School District No. 305. Keely Boyce is a citizen and resident of the state of Kansas and the United States.

6. Plaintiff Cruz Cedillo is an Hispanic student attending public school in Unified School District No. 443. Cruz Cedillo is a citizen and resident of the state of Kansas and the United States.

7. Plaintiff Lynette Do is an Asian-American student attending public school in Unified School District No. 443. Lynette Do is a citizen and resident of the state of Kansas and the United States.

8. Plaintiffs Christopher and Monique Harding are African-American students attending public school in Unified School District No. 443. Christopher and Monique Harding are residents and citizens of the state of Kansas and the United States.

9. Plaintiff Joseph Hawkinson is a disabled student as defined by the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* and the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq.* Joseph Hawkinson attends public school in Unified School District No. 305. Joseph Hawkinson is a resident and citizen of the state of Kansas and the United States.

10. Plaintiff Jennie Nguyen is an Asian-American student attending public school in Unified School District No. 443. Jennie Nguyen is a citizen and resident of the state of Kansas and the United States.

11. Plaintiffs Sandy, Nicole and Bruce Thu Pham are Vietnamese students attending public school in Unified School District No. 305. Sandy, Nicole and Bruce Thu

Pham are legal residents of the state of Kansas and the United States.

12. Plaintiff Andrea Bethke is a disabled student as defined by the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* and the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq.* Andrea Bethke attends public school in Unified School District No. 443 and is a citizen and resident of the state of Kansas and the United States.

13. Defendant State of Kansas is a state governmental entity and may be served with process by serving the Kansas Attorney General, Carla Stovall, at the Kansas Judicial Center, 2nd Floor, 301 W. 10th Street, Topeka, Kansas 66612-1597.

14. Defendant Bill Graves is the governor of the State of Kansas and may be served with process at his official office at 212S State Capitol, Topeka, Kansas 66612-1590.

15. Defendant I.B. "Sonny" Rundell is the chairperson of the Kansas State Board of Education. Defendant Rundell may be served with process at 120 S.E. 10th Street, Topeka, Kansas 66612.

16. Defendant Janet Waugh is a member of the Kansas State Board of Education. Defendant Waugh may be served with process at 120 S.E. 10th Street, Topeka, Kansas 66612.

17. Defendant Sue Gamble is a member of the Kansas State Board of Education. Defendant Gamble may be served with process at 120 S.E. 10th Street, Topeka, Kansas 66612.

18. Defendant John W. Bacon is a member of the Kansas State Board of Education. Defendant Bacon may be served with process at 120 S.E. 10th Street, Topeka, Kansas 66612.

19. Defendant Bill Wagnon is a member of the Kansas State Board of Education. Defendant Wagnon may be served with process at 120 S.E. 10th Street, Topeka, Kansas 66612.

20. Defendant Bruce Wyatt is a member of the Kansas State Board of Education. Defendant Wyatt may be served with process at 120 S.E. 10th Street, Topeka, Kansas 66612.

21. Defendant Harold L. Voth is a member of the Kansas State Board of Education. Defendant Voth may be served with process at 120 S.E. 10th Street, Topeka, Kansas 66612.

22. Defendant Carol Rupe is a member of the Kansas State Board of Education. Defendant Rupe may be served with process at 120 S.E. 10th Street, Topeka, Kansas 66612.

23. Defendant Valerie DeFever is a member of the Kansas State Board of Education. Defendant DeFever may be served with process at 120 S.E. 10th Street, Topeka, Kansas 66612.

24. Defendant Steve E. Abrams is a member of the Kansas State Board of Education. Defendant Abrams may be served with process at 120 S.E. 10th Street, Topeka, Kansas 66612.

25. Defendant Andy Tompkins is the commissioner of the Kansas State Department of Education. Defendant Tompkins may be served with process at 120 S.E. 10th Street, Topeka, Kansas 66612.

26. Defendant Tim Shallenburger is the Kansas State Treasurer. Defendant Shallenburger may be served with process at 900 S.W. Jackson, Suite 201, Topeka, Kansas 66612-1235.

27. For purposes of this First Amended Complaint, "individual defendants" shall mean Bill Graves, I.B. "Sonny" Rundell, Janet Waugh, Sue Gamble, John W. Bacon, Bill Wagnon, Bruce Wyatt, Harold L. Voth, Carol Rupe, Valerie DeFever, Steve E. Abrams, Andy Tompkins and Tim Shallenburger.

Jurisdiction and Venue

28. This court possesses original jurisdiction over plaintiffs' claims arising under the U.S. Constitution and federal law, pursuant to 28 U.S.C. § 1331.

29. Venue in this court is proper, pursuant to 28 U.S.C. § 1391(b).

Facts

30. The State of Kansas funds its public schools, grades K-12, through a state constitutionally mandated statewide system of school funding, including, but not limited to the School District Finance and Quality Performance Act (SDFQPA), K.S.A. 72-6405 *et seq.,* the capital outlay provisions of K.S.A. § 72-8801, *et seq.*; the special education excess cost provisions of K.S.A. § 72-961, *et seq.;* local option budgets (LOBs), low-enrollment weighting, and other funding mechanisms (collectively referred to hereinafter as the "school funding scheme"). Pursuant to this scheme, all public school districts in the state are allotted funds to operate their educational programs according to the school funding scheme.

31. The constitutional responsibility for educating school children in Kansas is a responsibility owed statewide.

32. The State of Kansas receives monies from education programs administered by the federal government of the United States. The State uses these monies to fund public school districts. Such monies are distributed along with State funds, pursuant to the school funding scheme.

33. Under the school funding scheme, each public school district receives a set amount of money per student enrolled in the district. This base rate is presently $3863 per student following a funding cut in August, 2002.

34. The base rate is adjusted by several factors, the most significant of which is low enrollment weighting. Public school districts with fewer than 1725 students receive

additional funds per student pursuant to low enrollment weighting. In many cases, public school districts qualifying for low enrollment weighting receive more than twice as many dollars per student as those districts that do not qualify for such weighting.

35. Hispanic, African-American and Asian-American students are disproportionately enrolled in mid-size and large school districts which do not qualify for low enrollment weighting and which receive comparatively little funding per pupil from the State of Kansas under the current school funding scheme. As a group throughout the state, Hispanic, African-American and Asian-American students receive less funding per pupil from the State than do white students. This disparity adversely affects the educational opportunities and outcomes for Hispanic, African-American and Asian-American students in comparison with white students.

36. Likewise, students of non-U.S. origin are disproportionately enrolled in mid-size and large school districts which do not qualify for low enrollment weighting and which receive comparatively little funding per pupil from the State of Kansas under the current school funding scheme. As a group throughout the state, they receive less funding per pupil than do students of U.S. origin, and this disparity in spending adversely affects their educational opportunities and outcomes in comparison with students of U.S. origin.

37. Disabled students also are disproportionately enrolled in mid-size and large school districts which do not qualify for low enrollment weighting and which receive comparatively little funding per pupil from the State. As a result of this funding disparity, disabled students as a group throughout the state receive fewer educational opportunities and suffer more unfavorable outcomes than do non-disabled students.

38. The plaintiffs are each enrolled in either Unified School District No. 443 or 305. Both USD 443 and USD 305 enroll too many students to qualify for low enrollment weighting. These districts also enroll disproportionately more African-American, Asian-American, Hispanic, non-U.S. origin and disabled students than do school districts which qualify for low enrollment weighting and which receive more funding per student.

39. Money makes a difference in the educational outcomes of Kansas public school students.

40. A direct correlation exists between the State's inequitable school funding scheme and unsatisfactory education outcomes experienced by Hispanic, African-American and Asian-American students throughout the state in comparison to the outcomes experienced by white students. The same correlation exists between the State's school funding scheme and unsatisfactory outcomes experienced by disabled students in comparison to the outcomes experienced by non-disabled students. Likewise, a correlation exists between the school funding scheme and unsatisfactory outcomes experienced by students of non-U.S. origin in comparison to outcomes experienced by students who are of U.S. origin. This contrast in educational outcomes between white and non-disabled students and the racial minorities, disabled and non-U.S. origin students described above has existed since at least 1995.

41. The SDFQPA permits individual school districts to pass local option budgets (LOBs) which supplement State funding. An LOB requires the levying of additional taxes and is sometimes dependant on the approval of residents of the district. A direct correlation exists between district wealth and the ability to raise income in a school district and that district's ability to raise funds through an LOB. School districts with high district wealth and property values raise

more funds through LOBs than those with comparatively low incomes and property values.

42. African-American, Hispanic and Asian students are disproportionately enrolled in school districts with comparatively low incomes and property values. These districts collect fewer funds through LOBs than districts which are enroll disproportionate numbers of white students. This disparity results in fewer educational opportunities and less satisfactory outcomes for minority students than for white students.

43. Similarly, students of non-U.S. origin are disproportionately enrolled in school districts which have low or non-existent LOBs. This disparity results in fewer educational opportunities and less satisfactory outcomes for non-U.S. origin students than for students who were born in the United States.

44. Likewise, disabled students are disproportionately enrolled in school districts with low or non-existent LOBs. This disparity results in fewer educational opportunities and less satisfactory outcomes for disabled students than for non-disabled students.

45. School districts with lower district wealth and lower property values with corresponding low LOBs have fewer dollars per pupil to spend than do those districts with high LOBs. A direct correlation exists between the fewer amount of dollars collected through LOBs in these districts and unsatisfactory education outcomes experienced by minority students, students of non-U.S. origin and disabled students.

46. In the likely event that the Kansas legislature does not pass a supplemental funding measure to fund present school finance needs, the less wealthy districts will have their LOBs reduced while the LOBs of the more wealthy districts will not be affected, creating even greater disparity and more unsatisfactory education for disabled, non-U.S. origin and minority students.

47. The defendants are aware that they are not adequately funding education statewide. Although the defendants are aware that they are not providing sufficient funds to school districts statewide, defendants continue to under-fund some districts' needs, cause such continuation, and/or fail to prevent such continuation, resulting in unsatisfactory education outcomes such as those suffered by the plaintiffs.

Count I: 42 U.S.C. § 1983 & Title VI Disparate Impact — Race

48. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-47 above as though fully set out herein.

49. Under color of state law, the individual defendants are acting with grave unfairness in enforcing the current school funding scheme and the under-funding of the formula which results in a deprivation of the significant rights of plaintiffs, LaJuan and Mytesha Robinson, Ryan Montoy, Rene Bess, Cruiz Cedillo, Lynette Do, Christopher and Monique Harding, Jennie Nguyen, and Sandy, Nicole and Bruce Thu Pham, not to be discriminated against on the basis of race and will continue to cause such deprivation unless enjoined. The school funding scheme and the under-funding of the formula have a disparate negative impact on students who are African-American, Hispanic and Asian, in violation of the implementing regulations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* and 42 U.S.C. § 1983.

50. The school funding scheme and the under-funding of the formula, although facially neutral, have a racially disproportionate adverse effect on African-American, Hispanic and Asian students. The school funding scheme and the under-funding of the formula perpetuate a dual system of education in Kansas, primarily, though not entirely, through the devices of low enrollment weighting and LOBs. African-American, Hispanic and Asian students

are disproportionately enrolled in school districts which have low LOBs and which receive fewer funds per pupil from the State. These students find themselves trapped in a system of which has less money to spend on them and thus adversely affects the quality of education available to them. Such students, in comparison to white students in the state, have disproportionately high dropout rates, are disproportionately the victims of violent acts at school, and their pass rates and standardized test scores are disproportionately low. They also have inferior access to education programs which would improve the quality of their education and which are disproportionately more available to white students.

51. There is no substantial legitimate justification or compelling state interest for the current school funding scheme and the under-funding of the formula which the individual defendants are executing, enforcing and perpetuating. Among other provisions of the school funding scheme, no legitimate justification exists for low enrollment weighting or the LOB as they are currently defined in the SDFQPA.

52. Equally effective alternative provisions are available which would eliminate the disparate negative impact currently suffered by African-American, Hispanic and Asian students. Such alternatives include, but are not limited to: eliminating low enrollment weighting where not supported by economies of scale or low population densities and more equitably distributing State funds to school districts which do not qualify for such weighting; eliminating the LOB and replacing it with uniform adequate statewide funding; and consolidation of low enrollment school districts (or funding such districts as though they were not low enrollment) where population density makes the same logistically possible.

53. As a result of the individual defendants' violation of Title VI, the plaintiffs named in paragraph 49 above have suffered and continue to suffer injury.

54. Because of the individual defendants' acts, plaintiffs have been required to retain the undersigned attorneys to protect their rights and prosecute these claims.

Count II: 42 U.S.C. § 1983 & Title VI Disparate Impact — National Origin

55. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-54 above as though fully set out herein.

56. Under color of state law, the individual defendants are acting with grave unfairness in enforcing the current school funding scheme and the under-funding of the formula which results in a deprivation of the significant rights of plaintiffs, Sandy, Nicole and Bruce Thu Pham, not to be discriminated against on the basis of national origin and will continue to cause such deprivation unless enjoined. The school funding scheme and the under-funding of the formula have a disparate adverse impact on students who are of non-U.S. origin, in violation of the implementing regulations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* and 42 U.S.C. § 1983.

57. The school funding scheme and the under-funding of the formula, although facially neutral, have a disproportionate adverse impact on students of non-U.S. origin. The school funding scheme and the under-funding of the formula perpetuate a dual system of education in Kansas, primarily, though not entirely, through the devices of low enrollment weighting and LOBs. Students of non-U.S. origin are disproportionately enrolled in school districts which have low LOBs and which receive fewer dollars per pupil from the State. These students are trapped in a system which has less money to spend on them and thus adversely affects the quality of education available to them. Compared to students of U.S. origin, such students have

disproportionately high dropout rates, they are disproportionately the victims of violent crimes at school and their pass rates and standardized test scores are disproportionately low. They also have inferior access to education programs which would improve the quality of their education and which are disproportionately available to students of U.S. origin.

58. There is no substantial legitimate justification or compelling state interest for the current school funding scheme and the under-funding of the formula which the individual defendants are executing, enforcing and perpetuating. Among other provisions of the school funding scheme, no legitimate justification exists for low enrollment weighting or the LOB as they are currently defined in the SDFQPA.

59. Equally effective alternative provisions are available which would eliminate the disparate adverse impact currently suffered by students of non-U.S. national origin. Such alternatives include, but are not limited to: eliminating low enrollment weighting where not supported by economies of scale or low population densities and more equitably distributing State funds to school districts that do not qualify for such weighting; eliminating the LOB and replacing it with uniform adequate statewide funding; and consolidation of low enrollment school districts (or funding such districts as though they were not low enrollment) where population density makes the same logistically possible.

60. As a result of the individual defendants' violation of Title VI, the plaintiffs named in paragraph 56 above have suffered and continue to suffer injury.

61. Because of the individual defendants' acts, plaintiffs have been required to retain the undersigned attorneys to protect their rights and prosecute these claims.

Count III: Title VI Intentional Discrimination — Race

62. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-61 above as though fully set out herein.

63. Defendants' current school funding scheme and the under-funding of the formula violate the rights of plaintiffs, LaJuan and Mytesha Robinson, Ryan Montoy, Rene Bess, Cruiz Cedillo, Lynette Do, Christopher and Monique Harding, Jennie Nguyen, and Sandy, Nicole and Bruce Thu Pham, not to be discriminated against on the basis of race. The defendants are intentionally discriminating against students who are African-American, Hispanic and Asian, in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq,* prohibiting intentional discrimination.

64. Defendants' actions constitute intentional discrimination on the basis of race in the following ways: The school funding scheme and the under-funding of the formula perpetuate a dual system of education in Kansas, primarily, though not entirely, through the devices of low enrollment weighting and LOBs of which defendants have knowledge and have deliberate indifference toward. African-American, Hispanic and Asian students are disproportionately enrolled in school districts which have low LOBs and which receive fewer funds per pupil from the State. These students find themselves trapped in a system of which has less money to spend on them and thus adversely affects the quality of education available to them. Such students, in comparison to white students in the state, have disproportionately high dropout rates, are disproportionately the victims of violent acts at school, and their pass rates and standardized test scores are disproportionately low. They also have inferior access to education programs which would improve the quality of their education and which are disproportionately more available to white students.

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65. Defendants do not have a substantial legitimate justification or compelling state interest for the current school funding scheme and the under-funding of the formula. Among other provisions of the SDFQPA, no legitimate justification exists for low enrollment weighting or the LOB as they are currently defined in that Act.

66. Equally effective alternative provisions are available which would eliminate the disproportionate negative impact currently suffered by African-American, Hispanic and Asian students of which defendants are aware, have deliberate indifference toward and are willfully allowing to perpetuate. Such alternatives include, but are not limited to: eliminating low enrollment weighting where not supported by economies of scale or low population densities and more equitably distributing State funds to school districts which do not qualify for such weighting; eliminating the LOB and replacing it with uniform adequate statewide funding; and consolidation of low enrollment school districts (or funding such districts as though they were not low enrollment) where population density makes the same logistically possible.

67. As a result of defendants' violation of Title VI, the plaintiffs named in paragraph 63 above have suffered and continue to suffer injury.

Count IV: Title VI Intentional Discrimination — National Origin

68. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-67 above as though fully set out herein.

69. Defendants' current school funding scheme and the under-funding of the formula violate the rights of plaintiffs, Sandy, Nicole and Bruce Thu Pham, not to be discriminated against on the basis of national origin. The defendants are intentionally discriminating against students on the basis of national origin, in violation of Title VI of the Civil Rights

Act of 1964, 42 U.S.C. § 2000d *et seq.*, prohibiting intentional discrimination.

70. Defendants' actions constitute intentional discrimination on the basis of national origin in the following ways: The school funding scheme and the under-funding of the formula perpetuates a dual system of education in Kansas, primarily, though not entirely, through the devices of low enrollment weighting and LOBs of which defendants have knowledge and have deliberate indifference toward. Students of non-U.S. origin are disproportionately enrolled in school districts which have low LOBs and which receive fewer dollars per pupil from the State. These students are trapped in a system which has less money to spend on them and thus adversely affects the quality of education available to them. Compared to students of U.S. origin, such students have disproportionately high dropout rates, they are disproportionately the victims of violent crimes at school and their pass rates and standardized test scores are disproportionately low. They also have inferior access to education programs which would improve the quality of their education and which are disproportionately available to students of U.S. origin.

71. Defendants do not have a substantial legitimate justification or compelling state interest for the current school funding scheme and the under-funding of the formula. Among other provisions of the SDFQPA, no legitimate justification exists for low enrollment weighting or the LOB as they are currently defined in that Act.

72. Equally effective alternative provisions are available which would eliminate the disproportionate adverse impact currently suffered by students of non-U.S. national origin of which defendants are aware, have deliberate indifference toward and are willfully allowing to perpetuate. Such alternatives include, but are not limited to: eliminating low enrollment weighting where not supported by economies of scale or low population densities and more equitably

distributing State funds to school districts that do not qualify for such weighting; eliminating the LOB and replacing it with uniform adequate statewide funding; and consolidation of low enrollment school districts (or funding such districts as though they were not low enrollment) where population density makes the same logistically possible.

73. As a result of defendants' violation of Title VI, the plaintiffs named in paragraph 69 above have suffered and continue to suffer injury.

Count V: 42 U.S.C. § 1983 & Title VI Intentional Discrimination — Race

74. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-73 above as though fully set out herein.

75. Under color of state law, the individual defendants are acting with grave unfairness in enforcing the current school funding scheme and the under-funding of the formula which result in a deprivation of the significant rights of plaintiffs, LaJuan and Mytesha Robinson, Ryan Montoy, Rene Bess, Cruiz Cedillo, Lynette Do, Christopher and Monique Harding, Jennie Nguyen, and Sandy, Nicole and Bruce Thu Pham, not to be discriminated against on the basis of race and will continue to cause such deprivation unless enjoined. The individual defendants are, in executing school funding law, intentionally discriminating against students who are African-American, Hispanic and Asian, in violation of section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.,* and 42 U.S.C. § 1983.

76. Said individual defendants' actions constitute intentional discrimination on the basis of race in the following ways: Enforcement of the school funding scheme and the under-funding of the formula perpetuates a dual system of education in Kansas, primarily, though not entirely, through the devices of low enrollment weighting and LOBs. African-American, Hispanic and Asian students are disproportionately enrolled in school districts which

have low LOBs and which receive fewer funds per pupil from the State of which defendants have knowledge and have deliberate indifference toward. These students find themselves trapped in a system of which has less money to spend on them and thus adversely affects the quality of education available to them. Such students, in comparison to white students in the state, have disproportionately high dropout rates, are disproportionately the victims of violent acts at school, and their pass rates and standardized test scores are disproportionately low. They also have inferior access to education programs which would improve the quality of their education and which are disproportionately more available to white students.

77. There is no substantial legitimate justification or compelling state interest for the current school funding scheme which the individual defendants are executing, enforcing and perpetuating. Among other provisions of the school funding scheme, no legitimate justification exists for low enrollment weighting or the LOB as they are currently defined in the SDFQPA.

78. Equally effective alternative provisions are available which would eliminate the disproportionate negative impact currently suffered by African-American, Hispanic and Asian students of which defendants are aware, have deliberate indifference toward and are willfully allowing to perpetuate. Such alternatives include, but are not limited to: eliminating low enrollment weighting where not supported by economies of scale or low population densities and more equitably distributing State funds to school districts which do not qualify for such weighting; eliminating the LOB and replacing it with uniform adequate statewide funding; and consolidation of low enrollment school districts (or funding such districts as though they were not low enrollment) where population density makes the same logistically possible.

79. As a result of the individual defendants' violation of Title VI, the plaintiffs named in paragraph 75 above have suffered and continue to suffer injury.

80. Because of the individual defendants' acts, plaintiffs have been required to retain the undersigned attorneys to protect their rights and prosecute these claims.

Count VI: 42 U.S.C. § 1983 & Title VI Intentional Discrimination — National Origin

81. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-80 above as though fully set out herein.

82. Under color of state law, the individual defendants are acting with grave unfairness in enforcing the current school funding scheme and the under-funding of the formula which result in a deprivation of the significant rights of plaintiffs, Sandy, Nicole and Bruce Thu Pham, not to be discriminated against on the basis of national origin race and will continue to cause such deprivation unless enjoined. The individual defendants are, in executing school funding law, intentionally discriminating against students on the basis of national origin, in violation of section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* and 42 U.S.C. § 1983.

83. Said individual defendants' actions constitute intentional discrimination on the basis of national origin in the following ways: Enforcement of the school funding scheme and the under-funding of the formula perpetuates a dual system of education in Kansas, primarily, though not entirely, through the devices of low enrollment weighting and LOBs of which defendants have knowledge and have deliberate indifference toward. Students of non-U.S. origin are disproportionately enrolled in school districts which have low LOBs and which receive fewer dollars per pupil from the State. These students are trapped in a system which has less money to spend on them and thus adversely affects the quality of education available to them.

Compared to students of U.S. origin, such students have disproportionately high dropout rates, they are disproportionately the victims of violent crimes at school and their pass rates and standardized test scores are disproportionately low. They also have inferior access to education programs which would improve the quality of their education and which are disproportionately available to students of U.S. origin.

84. There is no substantial legitimate justification or compelling state interest for the current school funding scheme which the individual defendants are executing, enforcing and perpetuating. Among other provisions of the school funding scheme, no legitimate justification exists for low enrollment weighting or the LOB as they are currently defined in the SDFQPA.

85. Equally effective alternative provisions are available which would eliminate the disproportionate adverse impact currently suffered by students of non-U.S. national origin of which defendants are aware, have deliberate indifference toward and are willfully allowing to perpetuate. Such alternatives include, but are not limited to: eliminating low enrollment weighting where not supported by economies of scale or low population densities and more equitably distributing State funds to school districts that do not qualify for such weighting; eliminating the LOB and replacing it with uniform adequate statewide funding; and consolidation of low enrollment school districts (or funding such districts as though they were not low enrollment) where population density makes the same logistically possible.

86. As a result of the individual defendants' violation of Title VI, the plaintiffs named in paragraph 82 above have suffered and continue to suffer injury.

87. Because of the individual defendants' acts, plaintiffs have been required to retain the undersigned attorneys to protect their rights and prosecute these claims.

Count VII: 42 U.S.C. § 1983 & Equal Protection — Race

88. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-87 above as though fully set out herein.

89. Under color of state law, the individual defendants are acting with grave unfairness in enforcing the current school funding scheme and the under-funding of the formula which result in a deprivation of the significant rights of plaintiffs, LaJuan and Mytesha Robinson, Ryan Montoy, Rene Bess, Cruiz Cedillo, Lynette Do, Christopher and Monique Harding, Jennie Nguyen, and Sandy, Nicole and Bruce Thu Pham to equal protection of the laws and not to be discriminated against on the basis of race and will continue to cause such deprivation unless enjoined. The present school funding scheme and the under-funding of the formula treat similarly situated white students in school districts with higher LOBs and low enrollment weighting differently. This creates an illegal classification on the basis of race and the individual defendants are discriminating against students who are African-American, Hispanic and Asian, on the basis of their race and depriving those plaintiffs of their right to equal protection of the laws, in violation of the Fourteenth Amendment to the U.S. Constitution.

90. Said individual defendants' actions constitute discrimination on the basis of race in the following ways: Enforcement of the school funding scheme and the under-funding of the formula perpetuates a dual system of education in Kansas, primarily, though not entirely, through the devices of low enrollment weighting and LOBs of which defendants have knowledge and have deliberate indifference toward. African-American, Hispanic and Asian students are disproportionately enrolled in school districts which have low LOBs and which receive fewer funds per pupil from the State. These students find themselves trapped in a system of which has less money to spend on them and thus

adversely affects the quality of education available to them. Such students, in comparison to white students in the state; have disproportionately high dropout rates, are disproportionately the victims of violent acts at school, and their pass rates and standardized test scores are disproportionately low. They also have inferior access to education programs which would improve the quality of their education and which are disproportionately more available to white students.

91. There is no compelling state interest or rational basis for the current school funding scheme and the under-funding of the formula which the individual defendants are executing, enforcing and perpetuating. Among other provisions of the school funding scheme, no legitimate justification exists for low enrollment weighting or the LOB as they are currently defined in the SDFQPA.

92. Equally effective alternative provisions are available which would eliminate the disproportionate negative impact currently suffered by African-American, Hispanic and Asian students of which the individual defendants are aware, have deliberate indifference toward and are willfully perpetuating. Such alternatives include, but are not limited to: eliminating low enrollment weighting where not supported by economies of scale or low population densities and more equitably distributing State funds to school districts which do not qualify for such weighting; eliminating the LOB and replacing it with uniform adequate statewide funding; and consolidation of low enrollment school districts (or funding such districts as though they were not low enrollment) where population density makes the same logistically possible.

93. As a result of the individual defendants' violation of equal protection rights of the Fourteenth Amendment to the U.S. Constitution while acting under color of state law, the plaintiffs named in paragraph 89 above have suffered and continue to suffer injury.

94. Because of the individual defendants' acts, plaintiffs have been required to retain the undersigned attorneys to protect their rights and prosecute these claims.

Count VIII: 42 U.S.C. § 1983 & Equal Protection — National Origin

95. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-94 above as though fully set out herein.

96. Under color of state law, the individual defendants are acting with grave unfairness in enforcing the current school funding scheme and the under-funding of the formula which result in a deprivation of the significant rights of plaintiffs, Sandy, Nicole and Bruce Thu Pham, to equal protection of the laws and not to be discriminated against on the basis of national origin and will continue to cause such deprivation unless enjoined. The present school funding law and the under-funding of the formula treats similarly situated students of U.S. origin in school districts with higher LOBs and low enrollment weighting differently. This creates an illegal classification on the basis of national origin and the individual defendants are discriminating against students of non-U.S. origin, on the basis of their national origin and depriving those plaintiffs of their right to equal protection of the laws, in violation of the Fourteenth Amendment to the U.S. Constitution.

97. Said individual defendants' actions constitute discrimination on the basis of national origin in the following ways: Enforcement of the school funding scheme and the under-funding of the formula perpetuates a dual system of education in Kansas, primarily, though not entirely, through the devices of low enrollment weighting and LOBs of which defendants have knowledge and have deliberate indifference toward. Students of non-U.S. origin are disproportionately enrolled in school districts which have low LOBs and which receive fewer funds per pupil from the State. These students find themselves trapped in a

system of which has less money to spend on them and thus adversely affects the quality of education available to them. Compared to students of U.S. origin, such students in the state have disproportionately high dropout rates, are disproportionately the victims of violent acts at school, and their pass rates and standardized test scores are disproportionately low. They also have inferior access to education programs which would improve the quality of their education and which are disproportionately more available to students of U.S. origin.

98. There is no compelling state interest or rational basis for the current school funding scheme and the under-funding of the formula which the individual defendants are executing, enforcing and perpetuating. Among other provisions of the school funding scheme, no legitimate justification exists for low enrollment weighting or the LOB as they are currently defined in the SDFQPA.

99. Equally effective alternative provisions are available which would eliminate the disproportionate negative impact currently suffered by students of non-U.S. origin of which defendants are aware, have deliberate indifference toward and are willfully perpetuating. Such alternatives include, but are not limited to: eliminating low enrollment weighting where not supported by economies of scale or low population densities and more equitably distributing State funds to school districts which do not qualify for such weighting; eliminating the LOB and replacing it with uniform adequate statewide funding; and consolidation of low enrollment school districts (or funding such districts as though they were not low enrollment) where population density makes the same logistically possible.

100. As a result of the individual defendants' violation of equal protection rights of the Fourteenth Amendment to the U.S. Constitution while acting under color of state law, the plaintiffs named in paragraph 96 above have suffered and continue to suffer injury.

101. Because of the individual defendants' acts, plaintiffs have been required to retain the undersigned attorneys to protect their rights and prosecute these claims.

Count IX: 42 U.S.C. § 1983 & Rehabilitation Act Disability Discrimination

102. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-101 above as though fully set out herein.

103. Under color of state law, the individual defendants are acting with grave unfairness in enforcing the current school funding scheme and the under-funding of the formula which result in a deprivation of the significant rights of plaintiffs, Sierra and Seth Gwin, Keely Boyce, Joseph Hawkinson and Andrea Bethke, not to be discriminated against on the basis of disability and will continue to cause such deprivation unless enjoined. The individual defendants are, in executing school funding law and the under-funding of the formula, discriminating against students who are disabled, in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* and 42 U.S.C. § 1983.

104. Said individual defendants' actions constitute discrimination on the basis of disability in the following ways: Disabled students are disproportionately enrolled in school districts which have low LOBs and which receive fewer funds per pupil from the State of which the defendants are aware and are deliberately indifferent toward. Because of funding inequities created by the school funding scheme, disabled students have inferior access to education programs, facilities and transportation, all of which would improve the quality of their education and which are disproportionately available to non-disabled students.

105. There is no substantial legitimate justification for the current school funding scheme and the under-funding of the formula which the individual defendants are enforcing, executing and perpetuating. Among other provisions of the

school funding scheme, no legitimate justification exists for low enrollment weighting or the LOB as they are currently defined in the SDFQPA.

106. Equally effective alternative provisions are available which would eliminate the disproportionate adverse impact currently suffered by disabled students of which defendants are aware, have deliberate indifference toward and are willfully perpetuating. Such alternatives include, but are not limited to: eliminating low enrollment weighting where not supported by economies of scale or low population densities and more equitably distributing State funds to school districts who do not qualify for such weighting; eliminating the LOB and replacing it with uniform adequate statewide funding; and consolidation of low enrollment school districts (or funding such districts as though they were not low enrollment) where population density makes the same logistically possible.

107. As a result of the individual defendants' violation of the Rehabilitation Act, the plaintiffs named in paragraph 103 above have suffered and continue to suffer injury.

108. Because of the individual defendants' acts, plaintiffs have been required to retain the undersigned attorneys to protect their rights and prosecute these claims.

Count X: Rehabilitation Act Disparate Impact

109. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-108 above as though fully set out herein.

110. Defendants' current school funding scheme and the under-funding of the formula violates the rights of plaintiffs Sierra and Seth Gwin, Keely Boyce, Joseph Hawkinson and Andrea Bethke not to be discriminated against on the basis of disability. The school funding scheme and the under-funding of the formula has a disparate negative impact on students who are disabled, in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*

111. The school funding scheme and the under-funding of the formula, although facially neutral, have a disproportionate adverse impact on disabled students. Disabled students are disproportionately enrolled in school districts which have low LOBs and which receive fewer funds per pupil from the State. Because of funding inequities created by the school funding scheme, disabled students have inferior access to education programs, facilities and transportation, all of which would improve the quality of their education and which are disproportionately available to non-disabled students.

112. There is no substantial legitimate justification for the current school funding scheme which the defendants are enforcing, executing and perpetuating. Among other provisions of the school funding scheme, no legitimate justification exists for low enrollment weighting or the LOB as they are currently defined in the SDFQPA.

113. Equally effective alternative provisions are available which would eliminate the disparate adverse impact currently suffered by disabled students. Such alternatives include, hut are not limited to: eliminating low enrollment weighting where not supported by economies of scale or low population densities and more equitably distributing State funds to school districts who do not qualify for such weighting; eliminating the LOB and replacing it with uniform adequate statewide funding; and consolidation of low enrollment school districts (or funding such districts as though they were not low enrollment) where population density makes the same logistically possible.

114. As a result of defendants' violation of the Rehabilitation Act, the plaintiffs named in paragraph 110 above have suffered and continue to suffer injury.

Count XI: 42 U.S.C. § 1983 & Rehabilitation Act Disparate Impact

115. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-114 above as though fully set out herein.

116. Under color of state law, the individual defendants' actions, in enforcing the current school funding scheme and the under-funding of the formula, result in a deprivation of the rights of plaintiffs Sierra and Seth Gwin, Keely Boyce, Joseph Hawkinson and Andrea Bethke not to be discriminated against on the basis of disability and will continue to cause such deprivation unless enjoined. The school funding scheme and the under-funding of the formula have a disparate negative impact on students who are disabled, in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* and 42 U.S.C. § 1983.

117. The school funding scheme and the under-funding of the formula, although facially neutral, have a disproportionate adverse impact on disabled students. Disabled students are disproportionately enrolled in school districts which have low LOBs and which receive fewer funds per pupil from the State. Because of funding inequities created by the school funding scheme, disabled students have inferior access to education programs, facilities and transportation, all of which would improve the quality of their education and which are disproportionately available to non-disabled students.

118. There is no substantial legitimate justification for the current school funding scheme and the under-funding of the formula, which the individual defendants are enforcing, executing and perpetuating. Among other provisions of the school funding scheme, no legitimate justification exists for low enrollment weighting or the LOB as they are currently defined in the SDFQPA.

119. Equally effective alternative provisions are available which would eliminate the disparate adverse impact

currently suffered by disabled students. Such alternatives include, but are not limited to: eliminating low enrollment weighting where not supported by economies of scale or low population densities and more equitably distributing State funds to school districts who do not qualify for such weighting; eliminating the LOB and replacing it with uniform adequate statewide funding; and consolidation of low enrollment school districts (or funding such districts as though they were not low enrollment) where population density makes the same logistically possible.

120. As a result of individual defendants' violation of the Rehabilitation Act, the plaintiffs named in paragraph 116 above have suffered and continue to suffer injury.

121. Because of the individual defendants' acts, plaintiffs have been required to retain the undersigned attorneys to protect their rights and prosecute these claims.

Count XII: Americans with Disabilities Act Disparate Impact

122. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-121 Above as though fully set out herein.

123. Defendants' current school funding scheme and the under-funding of the formula violates the rights of plaintiffs Sierra and Seth Gwin, Keely Boyce, Joseph Hawkinson and Andrea Bethke not to be discriminated against on the basis of disability. The current school funding scheme and the under-funding of the formula have a disparate negative impact on students who are disabled, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq.*

124. The current school funding scheme, including the SDFQPA, and the under-funding of the formula, although facially neutral, have a disproportionate adverse impact on disabled students. Disabled students are disproportionately enrolled in school districts which have low LOBs and which receive fewer funds per pupil from the State. Because of

funding inequities created by the current school funding scheme, disabled students have inferior access to educational programs, facilities and transportation, all of which would improve the quality of their education and which are disproportionately available to non-disabled students.

125. Defendants do not have a substantial legitimate justification for the current school funding scheme and the under-funding of the formula, including but not limited to those provisions of the Act relating to low enrollment weighting and the LOB.

126. Equally effective alternative provisions are available which would eliminate the disparate adverse impact currently suffered by disabled students. Such alternatives include, but are not limited to: eliminating low enrollment weighting where not supported by economies of scale or low population densities and more equitably distributing State funds to school districts who do not qualify for such weighting; eliminating the LOB and replacing it with uniform adequate statewide funding; and consolidation of low enrollment school districts (or funding such districts as though they were not low enrollment) where population density makes the same logistically possible.

127. As a result of defendants' violation of the Americans with Disabilities Act, the plaintiffs named in paragraph 123 above have suffered and continue to suffer injury.

Count XIII: 42 U.S.C. § 1983 & Americans with Disabilities Act Disparate Impact

128. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-127 Above as though fully set out herein.

129. Under color of state law, the individual defendants' actions, in enforcing the current school funding scheme and the under-funding of the formula, result in a deprivation of the rights of plaintiffs Sierra and Seth Gwin, Keely Boyce,

Joseph Hawkinson and Andrea Bethke not to be discriminated against on the basis of disability and will continue to cause such deprivation unless enjoined. The current school funding scheme and the under-funding of the formula have a disparate negative impact on students who are disabled, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq.* and 42 U.S.C. § 1983.

130. The current school funding scheme, including the SDFQPA, and the under-funding of the formula, although facially neutral, have a disproportionate adverse impact on disabled students. Disabled students are disproportionately enrolled in school districts which have low LOBs and which receive fewer funds per pupil from the State. Because of funding inequities created by the current school funding scheme, disabled students have inferior access to educational programs, facilities and transportation, all of which would improve the quality of their education and which are disproportionately available to non-disabled students.

131. There is no substantial legitimate justification for the current school funding scheme and the under-funding of the formula, which the individual defendants are enforcing, executing and perpetuating. Among other provisions of the school funding scheme, no legitimate justification exists for low enrollment weighting or the LOB as they are currently defined in the SDFQPA.

132. Equally effective alternative provisions are available which would eliminate the disparate adverse impact currently suffered by disabled students. Such alternatives include, hut are not limited to: eliminating low enrollment weighting where not supported by economies of scale or low population densities and more equitably distributing State funds to school districts who do not qualify for such weighting; eliminating the LOB and replacing it with uniform adequate statewide funding; and consolidation of low enrollment school districts (or funding such districts as

though they were not low enrollment) where population density makes the same logistically possible.

133. As a result of the individual defendants' violation of the Americans with Disabilities Act, the plaintiffs named in paragraph 129 above have suffered and continue to suffer injury.

134. Because of the individual defendants' acts, plaintiffs have been required to retain the undersigned attorneys to protect their rights and prosecute these claims.

Count XIV: Equal Protection

135. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-134 above as though fully set out herein.

136. Kansas' current school funding scheme and the under-funding of the formula violates the rights of all plaintiffs in this action to equal protection of the laws, guaranteed by the United States Constitution. The school funding scheme and the under-funding of the formula treats similarly situated students differently, depending on the number of students enrolled in their school districts and the relative wealth of those school districts, Plaintiffs have been adversely affected as a result of defendants' unequal application of the law.

137. Defendants lack a rational basis for low enrollment weighting. The low enrollment weighting threshold, currently set at 1725 students, as demonstrated in practice over the four years, is so wide of the mark as to be unreasonable. No rational basis exists for setting the threshold at 1725 students per school district.

138. The individual defendants in their official capacities, are, under color of state law, depriving plaintiffs of their right to equal protection, in violation of the Fourteenth Amendment to the U.S. Constitution. As a result of the unlawful acts of these defendants, plaintiffs have suffered and continue to suffer injury.

Count XV: Due Process

139. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-138 above as though fully set out herein.

139. The individual defendants, in their official capacities, under color of state law, have deprived and continue to deprive all plaintiffs to this action of the substantive due process rights guaranteed them by the U.S. Constitution.

140. Defendants fund, administer and perpetuate Kansas' statewide school funding scheme, including, but not limited to, its low enrollment weighting and LOB provisions, in an arbitrary and capricious manner. No rational justification exists for the school finance formula set forth in the current school funding scheme nor the under-funding of the formula.

141. As a result of defendants' unlawful acts, plaintiffs have suffered and continue to suffer injury.

Relief Requested

WHEREFORE, plaintiffs respectfully request the following relief:

a. prospective injunctive relief against defendants enjoining them from enforcing the current school funding scheme and prohibiting them from distributing funding to public schools in Kansas in any way that is unlawful under federal law;

b. their reasonable attorney fees incurred in litigating this action;

c. their expenses and the costs of this action; and

d. such other and further relief as the court deems just and equitable.

Respectfully submitted,

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IN THE

Supreme Court of the United States

STATE OF KANSAS, *et al.*,
Petitioners,

v.

CHEROKEE ROBINSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

No. 02-1314

STATE OF KANSAS, *et al.*,
Petitioners,

v.

CHEROKEE ROBINSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

FACTUAL BACKGROUND

This case concerns the method by which State of Kansas provides funding for its public schools. It is largely a centralized system. The State provides a base rate of $3,863 per student per year. App. 11a ¶ 33. It supplements that base rate in two ways relevant to this action:

- Low enrollment weighting, in which districts with less than 1725 students receive additional funds, in some cases more than twice as much per student as districts receiving the base rate. App. 110a-111a ¶ 34.
- Local option budgets, in which districts may levy taxes on local taxpayers. App. 112a ¶ 41.

Most plaintiffs/respondents are Hispanic, Asian-American or African-American students. App. 106a-08a ¶¶ 1-11. Five of them are disabled as defined in the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* and the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* App. 106a-08a ¶¶ 3; 5; 9; 12. They all attend public school in Unified Schools Districts 305 or 443. App. 106a-08a ¶¶ 1-12.

Hispanic, Asian-American and African-American students (and other students of non-U.S. origin) are typically concentrated in large and mid-size school districts, like Districts 305 and 443, that do not qualify for low enrollment weighting. App. 111a ¶¶ 35-36. Likewise, disabled students are typically concentrated in large or mid-size school districts that do not qualify for low enrollment weighting. App. 111a ¶ 37.

There is a direct correlation between the wealth of a school district and that district's ability to raise funds under a local option budget. App. 112a-13a ¶ 41. Hispanic, Asian-American and African-American students (and other students of non-U.S. origin) are typically concentrated in poor school districts, like Districts 305 and 443, that have low or nonexistent local option budgets. App. 113a ¶¶ 42-43. Likewise, disabled students are typically concentrated in poor school districts that have low or nonexistent local option budgets. App. 113a ¶ 44.

As a result, the Kansas school funding formula has a disparate impact on disabled students, as well as Hispanic, Asian-American and African-American students (and other students of non-U.S. origin). There is a direct correlation between these funding disparities and the unsatisfactory education which these students receive. App. 112a ¶ 40; 113a ¶ 45.

This action seeks prospective injunctive relief to redress these deficiencies under numerous different legal theories. Those relevant to the instant petition arise under § 504 of the

Rehabilitation Act, 29 U.S.C. § 794 and § 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1, and its implementing regulations. Basically, these statutes and regulations prohibit the States from using federal funds, such as education funds, in a manner which has a disparate impact on students based on their race, disability, or national origin.

ARGUMENT

I. THE COURT SHOULD DENY THE PETITION BECAUSE A RULING WOULD NOT HAVE ANY REAL PRACTICAL EFFECT ON THE LITIGATION.

Whatever the merit of the State's arguments, this case presents a singularly poor vehicle for resolving them. The issues the State raises in its petition are alternative theories for the relief that Respondents seek. Other legal theories, no longer challenged by the State, permit Respondents to seek that relief whether or not their position on the State's issues is right or wrong. Thus, a grant of certiorari would have no practical effect on the case.

The State's first issue inquires whether Respondents can enforce the disparate impact rule of Title VI in an action under 42 U.S.C. § 1983. As the court of appeals found, App. 4a, Respondents can "bring a disparate impact claim under section 504 of the Rehabilitation Act," and Petitioners "do not contend otherwise." The enforceability of Title VI via a § 1983 action makes no practical difference to the outcome.

Moreover, the State has waived this claim by failing to brief it below. The issues it briefed in the court of appeals related exclusively to its claims of sovereign immunity and abstention, not whether Respondents could enforce their Title VI rights in a § 1983 claim. "Ordinarily, this Court does not decide questions not raised or resolved in the lower courts." *Taylor v. Freeland and Kronz*, 503 U.S. 638, 646 (1992) (citations and internal punctuation omitted).

The State's second issue inquires whether the State waived its Eleventh Amendment immunity by accepting funds pursuant to 42 U.S.C. § 2000b-7. The only relief sought by Respondents, however, is prospective injunctive relief prohibiting defendants from distributing school funds in violation of federal law. App. 137a. As the court of appeals held, App. 10a, "the *Ex Parte Young* doctrine permits suits seeking prospective injunctive relief against state officials acting in their official capacity." The State has not attempted to challenge that part of the court of appeals' holding, which will now be the law of the case. Once again, it makes no practical difference to this lawsuit whether § 2000b-7 effectively waives the State's Eleventh Amendment immunity.

In effect, the State is asking this Court for an advisory opinion. When the issues presented "could not affect the judgment," those issues "would therefore be advisory." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991):

> [N]either counsel identified any way in which the interests of his client would be advanced by a favorable decision on the merits—except, of course, for the potential benefit that might flow from an advisory opinion. Because it is not the business of this Court to render such opinions, it wisely decides to dismiss a petition that should not have been granted in the first place.

Montana v. Imlay, 506 U.S. 5, 6 (1992) (Stevens, J., concurring).

II. THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENTS COULD ENFORCE THEIR RIGHTS UNDER § 602 OF THE 1964 CIVIL RIGHTS ACT VIA A § 1983 CLAIM.

42 U.S.C. § 1983 provides a private right of action against any actor under color of state law who deprives the plaintiff of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. In *Blessing v.*

Freestone, 520 U.S. 329 (1997), this Court set forth a three-part test to determine whether a particular statute creates a right that can be enforced under § 1983:

A. "Congress must have intended that the provision in question benefit the plaintiff."

B. The right thus created "is not so 'vague and amorphous' that its enforcement would strain judicial competence."

C. The statute must "unambiguously impose a binding obligation on the States."

520 U.S. at 340-41.

In applying the *Blessing* test, this Court has always considered the language of regulations implementing the statute. In *Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418 (1987), the statute limited the percentage of a tenant's income that a public housing authority could collect in rent. It also required the authority to make a "reasonable" allowance for utilities. The Housing Authority claimed that the statute was too vague to create enforceable rights under § 1983. In rejecting that argument, this Court expressly relied on the regulations:

> The regulations, however, defining the statutory concept of "rent" as including utilities, have the force of law, . . . they specifically set out guidelines that the PHAs were to follow in establishing utility allowances . . . . In our view, the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under Pennhurst and § 1983 . . . .

479 U.S. at 431-32. *Accord*, *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 511 (1990) (statute "and its implementing regulations did create rights enforceable under § 1983"); *Suter v. Artist M*, 503 U.S. 347, 361 (1992) (regulations "do not evidence a view that § 671(a) places any requirement for

state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary").

Common sense dictates that this must be the rule. Section 1983 is a broad statute that "must be given a liberal construction." *Lake County Estates, Inc. v. Tahoe Regional Planning Auth.*, 440 U.S. 391, 399-400 (1979). The statute applies to "rights . . . secured by . . . laws," not just rights secured by statutes. As *Wright* observed, regulations have the force of law. Moreover, Congress often delegates substantial discretion to administrative agencies. Unless courts consider regulations as well as the statute, then the broader the grant of authority to the agency the less likely it is that there will be enforceable rights. As a matter of policy, this is absolutely backward.

Taken together, § 602 and the implementing regulations clearly satisfy the *Blessing* standards. Section 602 is a broad grant of authority:

> To effectuate the provisions of section [601] . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. § 2000d-1. 34 C.F.R. § 100.3(a) provides:

> No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

34 C.F.R. § 100.3(b)(vii)(2) provides:

> A recipient [of federal funds] . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . .

34 C.F.R. § 100.1 provides that the purpose of the regulations is to assure:

> that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving federal financial assistance from the Department of Education.

The State has never suggested that these regulations are beyond the congressional grant of authority to the Department of Education. Thus, the statute and its implementing regulations confer on minorities the right to be free from discrimination, including methods of administration that have a disparate impact. Those provisions were unquestionably intended for the benefit of persons like Respondents.

Section 602 and its implementing regulations are at least as clear in the rights they create as the statute at issue in *Wilder*. There, the statute required states to provide assurances that their rates for Medicaid reimbursement were "reasonable and adequate" to compensate service providers. This Court held that there was "little doubt that health care providers are the intended beneficiaries" of that provision. 496 U.S. at 510.

A prohibition against disparate impact discrimination will not strain judicial competence; this Court has long recognized that Title VII of the 1964 Civil Rights Act prohibits such discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). And the absolute prohibition against such discrimination clearly imposes a binding obligation on the recipients of such funds. In developing a school funding formula that creates such discrimination, the State has plainly violated Respondents' rights.

It is true that a badly divided Third Circuit panel reached the opposite conclusion in *South Camden Citizens in Action v. New Jersey Dep't of Environmental Protection*, 274 F.3d 771

(3rd Cir.), *cert. denied*, ___ U.S. ___, 122 S. Ct. 2621 (2002). This Court has rarely found it appropriate to devote its scarce resources to resolving a conflict between two circuit courts.[1] One can confidently expect numerous opportunities in future years for either circuit to reconsider, or for other circuit courts to weigh in on the topic. Especially when the State did not even bother to brief the issue below, there is no need for this Court to intervene at this time.

The State cites *Sandoval* for the proposition that a regulation may not "create a right that Congress has not." Pet. at 9, *quoting Sandoval*, 532 U.S. at 291. The "right" in question in *Sandoval* was "a private right of action." *Id.* The issue here is whether the combination of the statute and the regulation confer a right to sue under § 1983. That is "a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute." *Wilder*, 496 U.S. at 508 n.9. Because "Congress rather than the courts controls the availability of remedies for violations of statutes," the Court imposes a higher burden on those who seek to imply a private cause of action. *Id.*:

> Because § 1983 provides an alternative source of express congressional authorization of private suits, . . . these separation of powers concerns are not present in a § 1983 case.

496 U.S. at 508 n.9.

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[1] The other circuit court cases the State cites do not involve Title VI, and hence are essentially irrelevant.

III. THE COURT OF APPEALS CORRECTLY HELD THAT, BY ACCEPTING FUNDS UNDER TITLE VI AND THE REHABILITATION ACT, THE STATE WAIVED ITS ELEVENTH AMENDMENT IMMUNITY.

42 U.S.C. § 2000d-7(a)(1) contains "an unambiguous waiver of the States' Eleventh Amendment immunity," *Lane v. Pena*, 518 U.S. 187, 200 (1996)—a waiver that explicitly covers both Title VI and the Rehabilitation Act. The court of appeals held that, "by accepting federal financial assistance" under both statutes, "states and state entities waive sovereign immunity from suit." App. 8a-9a.

As the State concedes, Pet. at 10, the great weight of authority supports this holding:

> Congress, in enacting 42 U.S.C. § 2000d-7(a)(1), permissibly conditioned GMU's receipt of Title IX funds on an unambiguous waiver of GMU's Eleventh Amendment immunity, and that, in accepting such funding, GMU has consented to litigate Litman's suit in federal court.

Litman v. George Mason University, 186 F.3d 544, 555 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000). *Accord, Pederson v. Louisiana State University*, 213 F.3d 858, 876 (5th Cir. 2000); *Nihiser v. Ohio Environmental Protection Agency*, 269 F.3d 626, 628 (6th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S. Ct. 2588 (2002); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. en banc 2000), *cert. denied*, 533 U.S. 949 (2001); *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997); *Sandoval v. Hagan*, 197 F.3d 484, 494 (11th Cir. 1999), *rev'd on other grounds*, 532 U.S. 275 (2001).

The State claims a circuit conflict based on *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), and the opinion in *Douglas v. California Dep't of Youth*

Authority, 285 F.3d 1226 (9th Cir. 2002), dissenting from denial of rehearing en banc. These opinions are entirely consistent with the majority rule.

Both plaintiffs sought damages for alleged violations of the Rehabilitation Act. In each case, the operative facts occurred before this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Prior to that decision, it was "reasonably understood" that Congress had "abrogate[d] New York's sovereign immunity under Congress' Commerce Clause authority." *Garcia*, 280 F.3d at 114. As a result, the State could not have *knowingly* waived its immunity by accepting funds, because the State did not know it had such immunity:

> [A] state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damage suits, . . . since by all reasonable appearances state sovereign immunity had already been lost.

Id.; *Douglas*, 285 F.3d at 1229.

Whatever the merit of that reasoning, it has nothing to do with Respondents' claim. By 1999, when Respondents filed their lawsuit, the State would reasonably have understood that Congress could not abrogate its Eleventh Amendment immunity under the commerce clause. Thus, the State faced a choice: accept federal funds conditioned on a waiver of its known right to Eleventh Amendment immunity or retain the immunity and decline the proffered funds. By choosing the funds, the State made a knowing decision to waive its immunity. Each year that this action remains pending, the State has had or will have exactly the same choice.

The State's suggestion that the court of appeals' opinion somehow contradicts *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board*, 527 U.S. 666 (1999), Pet. at 13-17, borders on the frivolous. *College*

Savings held that Congress could not waive the States' immunity merely by giving notice that further participation by the States in some kind of activity would subject them to suit; that kind of "constructive-waiver" was invalid. 527 U.S. at 680.

College Savings recognizes that the instant case presents a "fundamentally different" situation, of which the opinion expressly approves. 527 U.S. at 686:

> Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions.

Id. This Court has endorsed that rule since at least *State of Oklahoma v. U.S. Civil Service Com'n*, 330 U.S. 127, 143 (1947), and it is precisely what the court of appeals held in the instant case.

CONCLUSION

For these reasons, Respondents respectfully pray that the Court deny the petition for writ of certiorari.

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In the Supreme Court of the United States

STATE OF KANSAS, ET AL., PETITIONERS

v.

CHEROKEE ROBINSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners are subject to suit for damages for disability discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, because they knowingly and voluntarily waived their Eleventh Amendment immunity when they applied for and accepted federal financial assistance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 295 F.3d 1183. The opinion of the district court (Pet. App. 16a-63a) is reported at 117 F. Supp.2d 1124.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2002. A petition for rehearing en banc was denied on October 24, 2002 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on January 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. 794(a). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. See 29 U.S.C. 794a(a); *Barnes* v. *Gorman*, 536 U.S. 181 (2002); *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (1999).

In 1985, this Court held that the text of Section 504 was not sufficiently clear to show Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damage actions against state entities and held that, under Section 504, "mere receipt" of federal funds was insufficient to constitute a waiver. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 244-247 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003(a), 100 Stat. 1845. Section 2000d-7(a) provides, in relevant part:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794] * * *.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in

the suit against any public or private entity other than a State.

2. In May 1999, respondent Earnestine Robinson filed suit on behalf of her minor children and others similarly situated against the State of Kansas, its governor, and two of the State's education officials, alleging that the State's school financing scheme violates the disparate impact prohibitions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and the Fourteenth Amendment to the United States Constitution. Pet. App. 16a. The complaint sought prospective injunctive relief. Petitioners moved to dismiss the claims, arguing, *inter alia*, that they are immune under the Eleventh Amendment. The United States intervened to defend the constitutionality of the statutory provisions conditioning the receipt of federal financial assistance on a State's knowing and voluntary waiver of its Eleventh Amendment immunity.

The district court held that the State had waived its Eleventh Amendment immunity to claims under Title VI and under Section 504. Pet. App. 21a-28a. The district court also held that the individual defendants could be sued in their official capacities for prospective injunctive relief under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Pet. App. 28a-36a.

3. The defendants filed an interlocutory appeal challenging the district court's holding that they lacked Eleventh Amendment immunity. The Tenth Circuit did not address the defendants' immunity to the plaintiffs' Title VI disparate impact claims because, while this case was pending in the Tenth Circuit, this Court decided *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), which held that there is no private right of action to en-

force the Title VI regulations prohibiting disparate impact on the basis of race in federally funded programs and activities. Pet. App. 3a-6a. The court of appeals stated, however, that the plaintiffs could amend their complaint on remand to assert their Title VI disparate impact claims against the state officials not directly under Title VI, but under 42 U.S.C. 1983 instead. Pet. App. 4a & n.5. The court did address the validity of 42 U.S.C. 2000d-7, which conditions the receipt of federal financial assistance on a State's knowing and voluntary waiver of its Eleventh Amendment immunity to suits under, *inter alia*, Title VI and Section 504. The court held that, "by accepting federal financial assistance as specified in 42 U.S.C. § 2000d-7, states and state entities waive sovereign immunity from suit." Pet. App. 8a-9a. Accordingly, the court of appeals held that the state defendant had waived its immunity to suit under Section 504 by applying for and accepting federal funds clearly conditioned on such a waiver. The court of appeals also held that the plaintiffs could sue the defendant officials in an action under *Ex parte Young* for violations of the Fourteenth Amendment. Pet. App. 10a-13a.[1]

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[1] After the decision of the court of appeals, respondents filed an amended complaint in district court. Pet. App. 105a-138a. The amended complaint names some additional parties as defendants (compare *id.* at 105a (amended complaint) with *id.* at 79a (original complaint)), asserts the Title VI disparate impact claims as claims under 42 U.S.C. 1983 (see Pet. App. 114a-117a), and adds additional claims of intentional discrimination both directly under Title VI and, in separate counts, as claims under Section 1983 (see *id.* at 118a-124a).

ARGUMENT

The court of appeals correctly held that Congress validly conditioned receipt of federal funds on a waiver of immunity to claims under Section 504 of the Rehabilitation Act. That holding does not conflict with any decision of this Court and does not present a significant conflict with any decision of any other court of appeals. This Court recently denied petitions for writs of certiorari in *Pennsylvania Department of Corrections* v. *Koslow*, No. 02-801 (Mar. 3, 2003), *Hawaii* v. *Vinson*, No. 01-1878 (Jan. 13, 2003), *Chandler* v. *Lovell*, No. 02-545 (Jan. 13, 2003), and *Ohio Environmental Protection Agency* v. *Nihiser*, 536 U.S. 922 (2002). Those cases also presented the question whether Congress validly conditioned federal funds on a waiver of immunity for Section 504 claims. Accordingly, further review of that question is not warranted.

1. a. Section 2000d-7(a) of Title 42 provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." Petitioners do not dispute (Pet. 13) that Congress has the power under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, to condition the receipt of federal financial assistance on a State's knowing and voluntary waiver of its Eleventh Amendment immunity to Section 504 claims. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 686 (1999); *Alden* v. *Maine*, 527 U.S. 706, 755 (1999). Petitioners also do not dispute that the language of Section 2000d-7 was effective in putting them on clear notice that application for and acceptance of federal funds was conditioned on and would constitute a

waiver of their Eleventh Amendment immunity to suit under Section 504.[2]

Petitioners nonetheless contend (Pet. 10-13) that their waiver of immunity to suits under Section 504 was not "knowing" because of congressional action regarding States' immunity from suit under a different anti-discrimination statute, Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.* (ADA). For that proposition, petitioners rely primarily on the Second Circuit's decision in *Garcia* v. *State University of New York Health Sciences Center*, 280 F.3d 98 (2001).[3] The Second Circuit agreed with the other courts of appeals, see note 2, supra, that Section

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[2] That is the consensus of the courts of appeals. See *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 550-551 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Nihiser* v. *Ohio EPA*, 269 F.3d 626 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Jim C.* v. *United States*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, as amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 536 U.S. 924 (2002); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001). Even the Second and Fifth Circuits, which have held that the application of Section 504 to the States was for a time foreclosed because of concerns about notice to the States of their obligations, have not disputed that Section 504 may generally be applied to the States in the future, now that those concerns have dissipated. See *Pace* v. *Bogalusa City Sch. Bd.*, No. 01-31026, 2003 WL 1455194, at *11 n.15 (5th Cir. Mar. 24, 2003); *Garcia* v. *S.U.N.Y. Health Sci. Ctr.*, 280 F.3d 98, 113-115 (2d Cir. 2001).

[3] Since petitioners filed their petition, the Fifth Circuit has adopted the reasoning of the Second Circuit's decision in *Garcia*. See *Pace* v. *Bogalusa City Sch. Bd.*, No. 01-31026, 2003 WL 1455194 (5th Cir. Mar. 24, 2003). The United States has filed a petition for rehearing en banc in *Pace*, which is currently pending.

2000d-7 "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity." *Id.* at 113. And it further agreed that, under normal circumstances, "the acceptance of funds conditioned on the waiver might properly reveal a knowing relinquishment of sovereign immunity." *Id.* at 114 n.4. But the court nonetheless held that the State's acceptance of clearly-conditioned funds "alone is not sufficient for us to find that New York actually waived its sovereign immunity in accepting federal funds" in that case. *Id.* at 113-114. Instead, the Second Circuit held that courts must also consider "whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity." *Id.* at 115 n.5. The Court held that that additional requirement was not satisfied because, at the time the State accepted funds, "Title II of the ADA was reasonably understood to abrogate New York's sovereign immunity." *Id.* at 114. The court reasoned that, because "the proscriptions of Title II and § 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, * * * since by all reasonable appearances state sovereign immunity had already been lost." *Ibid.* (citation omitted).

The Second Circuit's conclusion about what constitutes a knowing waiver is incorrect, for several reasons. First, since the enactment of Section 2000d-7 in 1986, the plain text of that provision has informed every state agency that, if it applies for and accepts federal financial assistance, part of the "contract" for receiving those funds is the requirement that the state agency consent to suit in federal court for alleged violations of Section 504. Section 504 was not amended or altered by the

enactment of Title II of the ADA in 1990, and it has always been clear that plaintiffs could sue under either statute. See 42 U.S.C. 12201(b) (preserving existing causes of action). A state agency that applied for and accepted federal funds at any time after 1986 would have known that it was waiving its Eleventh Amendment immunity from suit under Section 504, regardless of whether it retained its immunity from suit under a distinct statute—the ADA—that imposed similar substantive obligations. Cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 103 n.12 (1984) (immunity must be assessed on a claim-by-claim basis).

More generally, the Second Circuit in *Garcia* erred in concluding that a State's acceptance of clearly-conditioned federal funds may be insufficient to find that a State has knowingly and voluntarily waived its immunity. Under this Court's precedents, the existence of a waiver may be found in a State's objective manifestation of assent by accepting funds that Congress has clearly conditioned on a State's consent to waive its Eleventh Amendment immunity.[4] See, *e.g.*, *College Sav. Bank*, 527 U.S. at 686 ("acceptance of the funds entails an agreement" to funding conditions). The Second Circuit's attempt to add an additional, subjective component to the analysis conflicts with this Court's recent holding in *Lapides* v. *Board of Regents of the University System of Georgia*, 535 U.S. 613, 617-619 (2002). In that case, this Court held that a State's

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[4] This objective approach is consistent with basic contract law principles under which agreement to a contract is determined by objective manifestations of assent. See Restatement (Second) of Contracts §§ 2, 18 (1981); cf. *Barnes* v. *Gorman*, 536 U.S. 181, 186 (2002) (observing that the Court has "regularly applied the contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable for money damages").

waiver of immunity turns upon its objective conduct (there, of removing a case to federal court), even though the State did not believe at the time it engaged in that conduct that it would result in a waiver of immunity. See *id.* at 621-623. In so holding, this Court specifically refused to make the unequivocal waiver question turn upon the State's subjective beliefs. *Id.* at 620-623. "Motives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* at 621.[5] *Garcia* requires courts to engage in the difficult evaluation of States' subjective beliefs and motives, in conflict with the clear jurisdictional rule established in this Court's prior cases.

b. Petitioners also contend that the court of appeals' decision is contrary to this Court's decision in *College*

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[5] This Court's decision in *Lapides* also disposes of petitioners' assertion, in passing (Pet. 17), that the Kansas Department of Education did not have authority under state law to waive its Eleventh Amendment immunity. This Court held in *Lapides* that "whether a particular set of state laws, rules, or activities amounts to a waiver of the State's Eleventh Amendment immunity is a question of federal law." 535 U.S. at 623. The Court then established "[a] rule of federal law" designed to "avoid[] inconsistency and unfairness." *Ibid.* The Court held that, so long as state law authorized the state attorney general to engage in the relevant litigation conduct, such conduct would constitute an effective waiver regardless of whether the official had state law authority to waive immunity. *Ibid.* Petitioners do not claim that the state education department lacks the authority to apply for and accept federal funds. Under *Lapides*, no further state law inquiry is required. Instead, whether the state's acceptance of federal funds constitutes a waiver is a question of federal law, one that Congress itself answered in the affirmative by the plain language and structure of Section 2000d-7. Moreover, petitioners failed to raise in the court of appeals any claim that the Department of Education's waiver was invalid because that agency had insufficient authority to waive its immunity.

Savings Bank v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). But, as noted above, the Court stated in *College Savings Bank* that "a waiver [of immunity] may be found in a State's acceptance of a federal grant" that was clearly conditioned upon a State's waiver of its Eleventh Amendment immunity. *Id.* at 678 n.2 (citation omitted). The Court further made clear that its recent sovereign immunity cases have done nothing to undermine well-settled authority under which Congress may condition federal "gifts," such as federal financial assistance, on a State's waiver of its sovereign immunity. See *id.* at 686-687.

College Savings Bank involved a statute, enacted under the Commerce Clause, that regulated false and misleading advertising. This Court held that Congress could not condition a State's participation in interstate commerce on a waiver of its immunity to private suit for violations of the statute. However, this Court distinguished as "fundamentally different" statutes in which Congress, "in the exercise of its spending power, conditions its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and [under which] th[e] acceptance of the funds entails an agreement to the actions." 527 U.S. at 686. This Court also reaffirmed the holding of *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), in which the Court held that Congress could condition the exercise of another of its Article I powers —the approval of interstate compacts—on a State's knowing and voluntary agreement to waive its Eleventh Amendment immunity from suit. 527 U.S. at 686. The Court explained that, unlike Congress's power under the Commerce Clause to regulate "otherwise lawful activity," Congress's power to give money to States and

to authorize interstate compacts are "gifts" on which Congress may place conditions that a State is free to accept or reject through its actions of applying for and accepting federal funds or entering interstate compacts. *Id.* at 687.[6]

Although petitioners concede (Pet. 13) that 42 U.S.C. 2000d-7 clearly expresses Congress's intent to condition the receipt of federal funds on a State's knowing and voluntary waiver of its Eleventh Amendment immunity, petitioners also contend that Section 2000d-7 is not an effective waiver provision because it was intended to act as a unilateral abrogation of immunity, and not as a condition with which the recipient was required to agree in order to receive the federal funds. It does not matter, however, whether Congress thought that Section 2000d-7 was a clear abrogation of a State's Eleventh Amendment immunity or a clear notice that application for and acceptance of funds would constitute a waiver of a State's Eleventh Amendment immunity. Either way, the obligation is incurred only when a recipient elects to apply for and accept federal financial assistance, and either way, Congress has not imposed the requirement on the States unilaterally. If a state agency does not wish to accept the conditions attached to the funds (non-discrimination and suits in federal court), it is free to decline the assistance. But if it does

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[6] Petitioners' suggestion (Pet. 15) that applying for and receiving federal financial assistance is an "act that [a State] already has every right to take" misunderstands the distinction this Court drew in *College Savings Bank*. Unlike participation in commercial activities, a State has no right to help itself to federal funds absent some affirmative steps by Congress to offer such funds. When a State applies for and accepts federal funds, it must comply with the conditions Congress clearly places upon those funds.

accept federal money, then it is clear that it has agreed to the conditions as well.[7]

Because Congress clearly expressed its intent to condition federal funds on a State's waiver of its Eleventh Amendment immunity to private suits under Section 504, there is no requirement that a state agency's assent to the waiver be manifested in a manner apart from its voluntary action in applying for and accepting the federal funds. The same is true in other settings in which it is clear to States that a loss of Eleventh Amendment immunity will be triggered by an action completely within the control of a state agency. For example, in the bankruptcy context, the courts of appeals are in agreement that, after Congress made clear in 11 U.S.C. 106(b) that the effect of filing a proof of claim in a bankruptcy court would be the loss of immunity from claims arising out of the same transaction or occurrence, state agencies waive their Eleventh Amendment immunity by filing a proof of claim. See, *e.g.*, *Arecibo Cmty. Health Care, Inc.* v. *Puerto Rico*, 270 F.3d 17, 27-28 (1st Cir. 2001) (so holding and collecting cases), cert. denied, 123 S. Ct. 73 (2002); see also

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[7] This was the Executive's understanding at the time of the enactment of Section 2000d-7. The Department of Justice explained to Congress while the legislation was under consideration that "[t]o the extent that the proposed amendment is grounded on congressional spending powers, [it] makes it clear to [S]tates that, their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986). On signing the bill into law, President Reagan similarly explained that the Act "subjects States, as a condition of their receipt of Federal financial assistance, to suits for violation of Federal laws prohibiting discrimination on the basis of handicap, race, age, or sex to the same extent as any other public or private entities." 22 Weekly Comp. Pres. Doc. 1420 (Oct. 21, 1986).

Lapides, 535 U.S. at 618-621 (discussing ability of the States to waive Eleventh Amendment immunity through litigation conduct).

Thus, because the decision of the court of appeals was correct, because it does not conflict with any decision of this Court, and because any conflict between the court of appeals' decision in this case and the decision of any other courts of appeals is a temporary and transitional one, see p. 6 n.2, *supra*, further review of question two is unwarranted.

2. The United States intervened in this case for the limited purpose of defending the constitutionality of the statutory provisions conditioning the receipt of federal financial assistance on a State's knowing and voluntary waiver of its Eleventh Amendment immunity, not to address the questions regarding the application of 42 U.S.C. 1983 to a claim alleging a violation of Department of Education regulations. Insofar as the United States addresses other issues beyond those for which it intervened, it does so in a capacity analogous to that of amicus curiae. Accordingly, the government did not address below the petition's substantive claims concerning the enforceability of the Department of Education regulations in a suit under Section 1983, and it does not do so here.[8]

Nonetheless, the first question listed in the petition is neither presented by this case nor one over which the court of appeals likely had jurisdiction. That question is:

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[8] None of the briefs filed in the case addressed the question whether the Department of Education regulations could be enforced in a private suit under 42 U.S.C. 1983, although the parties did call the court's attention to this Court's decision in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001).

> May a private action under 42 U.S.C. 1983 be brought to enforce disparate impact regulations promulgated by a federal administrative agency under Title VI of the Civil Rights Act of 1964?

Pet. i.

As the court of appeals realized, respondents' complaint—as originally filed and as it remained at the time of the decisions of the district court and the court of appeals in this case—did not allege a violation of 42 U.S.C. 1983. See Pet. App. 3a n.2, 4a n.5. The court of appeals nonetheless made several strong statements indicating its belief that respondents' disparate impact claim alleging a violation of federal regulations could be brought under Section 1983. See, *e.g.*, *id.* at 4a. Those statements, however, are dicta. See *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court 'reviews judgments, not statements in opinions.'") (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). The fact that, after the court of appeals' decision, respondents filed an amended complaint in district court that asserted a claim under Section 1983 did not convert the court of appeals' dicta into a holding. This case accordingly does not present the question on which petitioners assert (Pet. 5-7) there is a conflict in the circuits.

Moreover, had the question whether a private action under Section 1983 is available been an issue before the district court in this case, the court of appeals likely would not have had jurisdiction to review it. The courts of appeals "have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. 1291. This Court has held that the "effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete." *Cohen* v.

Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). There is a small class of district court orders that are considered "final decisions" and therefore immediately appealable under the collateral order doctrine, even though they are not "final judgments." See *Abney* v. *United States*, 431 U.S. 651, 658 (1977). An order denying a defendant's motion to dismiss on Eleventh Amendment grounds falls within that class of immediately appealable collateral orders. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). Accordingly, the court of appeals had jurisdiction over petitioners' appeal from the district court's order denying them sovereign immunity in this case.

This Court has suggested, however, that there is no pendent appellate jurisdiction over issues that do not themselves give rise to an immediate collateral appeal and are neither intertwined with nor necessary to ensure meaningful review of issues properly before the court of appeals. See *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 48-51 (1995) (rejecting pendent party appellate jurisdiction). Petitioners do not suggest that the question whether the Department of Education regulations can be enforced in a Section 1983 suit is one of the small class on which an immediate collateral appeal would be permitted, and it is not intertwined with or necessary to the decision of the Section 504 issue. Accordingly, the court of appeals likely would not have had jurisdiction to decide the first question presented in the petition. Because the Section 1983 issue was not properly presented to the court of appeals nor briefed by the parties, the court had no occasion to confront the jurisdictional question squarely. For that reason, the first question presented in the petition is not properly before this Court at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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